(19,040.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 389.

THE LOUISVILLE TRUST COMPANY, RECEIVER OF THE ESTATE OF THE EVENING POST COMPANY, APPELLANT,

vs.

STUART R. KNOTT ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

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1 Proceedings of the circuit court of the United States for the western district of Kentucky at a regular term begun and held at the Federal Court hall in the city of Louisville on Monday, March 9th, A. D. 1903.

Present and presiding, Honorable Walter Evans, sitting as circuit judge.

STUART R. KNOTT, Complainant,
vs.
EVENING POST COMPANY, Defendant.

This day came the complainant, by Humphrey, Burnett & Burnett, his counsel and filed in the clerk's office of said court his bill of complaint against the above named defendant, which bill of complaint is in words and figures as follows, to-wit:

In the Circuit Court of the United States, Sixth Circuit, Western District of Kentucky.

STUART R. KNOTT, Complainant,
vs.
EVENING POST COMPANY, COLUMBIA FINANCE & TRUST COMPANY, R. W. Knott, B. G. Boyle, E. Q. Knott, Defendants. } Bill in Equity.

To the judges of the circuit court of the United States for the sixth circuit and western district of Kentucky:

Stuart R. Knott brings this bill of complaint against the Evening Post Company, Columbia Finance & Trust Company, R. W. Knott, B. G. Boyle, and E. Q. Knott, and thereupon the complainant says:

1. That he is a citizen and resident of the State of Missouri; that the defendant, The Evening Post Company, is a corporation duly created by and organized under the laws of the State of Kentucky and a citizen and resident of said State; that the defendant,
2 The Columbia Finance & Trust Company, is a corporation duly created by and organized under the laws of Kentucky, and a citizen and resident of that State; that the individual defendants, R. W. Knott, B. G. Boyle, and E. Q. Knott, are and each of them is a citizen and resident of the State of Kentucky, and that all of the defendants are citizens and residents of the western district of Kentucky; and that the complainant brings this suit on behalf of himself and all other persons similarly interested and who are creditors of the defendant, The Evening Post Company.

2. That heretofore, to wit, on the 26th day of May, 1903, he recovered a judgment against the Evening Post Company on law side

of the docket of this court; that by said judgment it was adjudged that the complainant recover of the defendant, The Evening Post Company, the following sums, viz., $1,000.00, with interest at the rate of 6 per centum per annu- from the 30th day of April 1903 until paid; $1,000.00 with interest at the rate of 6 per centum per annum from the 30th day of April, 1903, until paid; $4,000.00 with interest at the rate of 6 per centum per annum from the 30th day of April, 1903, until paid; and his costs in said cause expended; that execution of *fieri facias* issued upon said judgment and was placed in the hands of the marshal of this court, and was by him returned "No property found;" that a duly certified copy of said judgment, said execution and sai- return is filed herein; that no part of said judgment has ever been paid or in any way satisfied, nor has said judgment been appealed from.

3. That the defendant, The Evening Post Company, is a corporation duly created by and organized under the laws of the State of Kentucky, viz., under chapter 56 of the General Statutes of said State of Kentucky; that by its articles of incorporation it began its corporate life May 1, 1878, and by the terms of said articles of incorporation such corporate life was to continue for twenty-five years; that the said twenty-five years expired on May 1, 1903, but by what is known as the Kentucky Statutes, section 561, it is, among other things, provided that when any corporation expires by the terms of the articles of incorporation it may thereafter continue to act for the purpose of closing up its business but for no other purpose, and it shall be the duty of the officers to settle up its affairs as speedily as possible.

3 4. On April 30, 1903, there was a meeting of the stockholders of the said defendant, The Evening Post Company. At said meeting the following resolution was adopted by a vote of the owners of all the stock except 48 shares, the owners of which voted against the resolution. Said resolution is as follows:

"Be it resolved: (1.) That the Columbia Finance & Trust Company be and it is hereby appointed liquidator of the affairs of the corporation, with directions to operate for the use of the stockholders the affairs and business of said corporation as they have been operated until the property can be properly advertised and sold and the possession thereof delivered to the purchaser.

(2.) That prior to the said sale liquidator shall cause to be made for the use of the stockholders a comprehensive statement of the assets and liabilities of the corporation, and furnish each stockholder with a copy of said statement.

(3.) That the said liquidator shall in its advertisement specify the nature of the articles to be sold, and shall make such sale for cash to be paid on the delivery of possession, and shall require of the purchaser that he deposit a certified check for an amount equal to one-third of the total purchase price which the liquidator shall hold and credit upon the purchase price when the sale is consummated, or if for any reason it shall be set aside, return to the bidder. If said bidder to whom the property is knocked down shall fail at once to

deliver to the liquidator the certified check as herein provided, the liquidator shall immediately re-sell the property and refuse to receive bids from said former bidder.

(4.) Said liquidator may in his discretion employ an auctioneer or other agent necessary or proper to be used in the sale of the property.

(5.) Until said sale, and during the operation of said property, said liquidator is given full authority and permission to employ such agents and persons as may be necessary to properly, conveniently and economically operate the company, and keep an account of all its expenses and take vouchers therefor. And after the property has been fully administered it shall make out a comprehensive account of its actings and doings, and shall furnish a copy
4 thereof to each of the stockholders.

(6.) The said liquidator shall, from the proceeds of the sale of the property, pay all the debts of the corporation, and the balance, if any, shall be distributed among the stockholders according to their legal rights."

5. That the Columbia Finance & Trust Company, named in said resolution, took possession of all the property, books and papers of the said defendant. Evening Post Company, purporting to act under the terms of the said resolution, but the claim is made that the stockholders had no right to pass any such resolutions; that the liquidator had no right to take possession of the assets thereunder, or, at least, doubt has arisen as to whether such resolution was valid or as to whether the said liquidator had the right so to take possession.

6. That doubt has arisen as to whether, by the expiration of the charter of the Evening Post Company on May 1, 1903, it was subject to suit thereafter, although complainant insists that it was and now asserts that the judgment obtained by the complainant is in all respects valid and legal; that claim is made, or doubt has arisen, as to whether, by virtue of the terms of the Kentucky statutes as hereinbefore quoted, all of the property of the said corporation vested in its officers as trustees, with the duty incumbent upon them of winding up its affairs, paying its debts and disposing of its assets; that the defendant, R. W. Knott, is the last president of the Evening Post Company; the defendant, B. G. Boyle, is the last vice-president; the defendant E. Q. Knott, is the last secretary and treasurer, both offices being in one.

7. That so it is that three different theories are advanced in reference to the property of the said Evening Post Company as it existed upon the day its charter life expired; viz., (*a*) that by virtue of the statute it continued in existence, with capacity to sue and be sued; (*b*) that by virtue of the statute all of its assets vested in its officers in trust, to dispose of the same and out of the proceeds of the sale thereof to pay the creditors; (*c*) that by virtue of the resolution of the stockholders at their meeting of April 30, 1903 (the particulars of which have been given above) all said assets have vested in the defendant, The Columbia Finance & Trust Company as liquidator,

whose duty it is to dispose of the said assets and out of the proceeds to pay the debts.

5 8. That the stockholders of the said defendant, Evening Post Company, are at variance among themselves, and such disputes are likely to produce such action as will greatly injure the property of the Evening Post Company and make it of much less value than the amount of its debts.

9. That complainant's claim, as set up in his suit at law, and upon which he obtained the judgment hereinbefore recited, was on three notes; that each of them was executed by the defendant, The Evening Post Company—two of said notes being dated July 1, 1896, and by each of which the Evening Post Company agreed and promised to pay to the plaintiff, at sight, the sum of $1,000.00; that interest on these notes has been paid up to April 1, 1903; the other note bears date January 1, 1903, and by its term- the Evening Post Company agreed and promised to pay to the order of this complainant the sum of $4,000 on demand; that interest on this note has been paid up to April 1, 1903; that no part of the principal of any of said notes has been paid, and no part of the interest since April 1, 1903.

10. That he is advised that the said Evening Post Company owe a large amount of debt and that it is necessary to protect carefully the assets of said company in order that said debts may be paid; that the property of said company is of a peculiar kind; that its business has been that of conducting an afternoon newspaper; that attached to said paper is what is called the Western Associated Press franchise; under which the conductor of the said paper was entitled to receive the news gathered by a voluntary association called the Western Associated Press; that the ownership of such a franchise and its appurtenance to the paper is essential to its profitable publication; that the said company, having been engaged during all of its charter life in the publishing of the said afternoon paper in the city of Louisville, had accumulated advertising patronage and a circulating list, and had also obtained a good will, but these things, like the press franchise, are only valuable in the event there is a continued publication and circulation of the paper.

11. That in order that the creditors of the said Evening Post Company may receiver any considerable amount of their debts it is absolutely necessary that a receiver shall be appointed who shall take into his hands and under his control, subject to the orders of this court, all of the property of the said Evening Post Com-

6 pany—its books of account, its records, its circulation lists and everything else appertaining to the said corporation or the business of the said corporation, and that the said receiver shall have authority, under the order of this court, by some suitable arrangement, to continue the publication of the said paper, and that a speedy decree should be entered herein, directing the property of the said Evening Post Company, with its good-will, its circulating list and other attendant rights, to be sold, and that such decree be

made in a case where all parties shall be present who have or claim to have any legal or equitable title in such property.

12. That if such relief as is herein claimed be not afforded, then the property of the said Evening Post Company will be dissipated or damaged to such an extent that creditors will not obtain anything like what is justly due to them; that there is no remedy at law for the complainant and other persons similarly situated that is in any degree adequate.

The premises considered, the complainant prays: That this court will at once appoint a receiver herein and direct the parties hereto to deliver into his hands all the rights, properties franchises, books of account, records, documents, choses in action and all other things now or lately belonging or appertaining to the Evening Post Company, and whether in the hands of the said Evening Post Company or of the said Columbia Finance & Trust Company, or the said R. W. Knott B. G. Boyle, or E. Q. Knott: that the said receiver be directed forthwith to report to this court what such property is and what arrangement can be made for the continued publication of said paper until a decree can be entered directing a sale herein; that this court ascertain what debts are due by the said Evening Post Company, by reference to a commissioner or other proper proceeding; that it will apply to the payment of the said debts the property of the said Evening Post Company in the just order of priorities, if priorities there be, and will provide for costs and expenses of this suit; that all other and proper equitable relief may be had looking to the administration of the estate of the said Evening Post Company and the payment of its just debts; an- to that end, the sale of its proporty and the bringing of money produced by such sale into the registry of the court for distribution among the creditors.

May it please your honors to grant unto the complainant a
7 writ of subpœna directed to the defendants, The Evening Post Company, Columbia Finance & Trust Company, R. W. Knott, B. G. Boyle, and E. Q. Knott, commanding them under a penalty to be therein fixed, to appear on the day therein named and to make answer hereunto, but not under oath, answer under oath being waived, and to stand and abide by all that the court may herein decree. And the complainant will ever pray.

HUMPHREY, BURNETT & HUMPHREY,
For Complainant.

The certified copy of judgment, execution and return thereon above referred to are as follows:—

Circuit Court of the United States for the Western District of Kentucky.

TUESDAY, *May 26th, A. D.* 1903.

STUART R. KNOTT, Plaintiff,
vs.
EVENING POST COMPANY, Defendant.

This day came the plaintiff by Humphrey, Burnett and Humphrey, his attorneys. Came also the defendant, by Helm, Bruce & Helm, its attorneys, and filed its answer herein. By consent of parties this case is submitted for judgment and the court being fully advised thereof, it is ordered that the plaintiff, Stuart R. Knott, recover of the defendant, The Evening Post Company, the sum of six thousand dollars ($6,000.00), the debt in the petition demanded, with interest thereon at the rate of six per cent. per annum from the 30th day of April, 1903, until paid, also his costs herein expended.

On motion of the plaintiff, and upon grounds shown, it is ordered that execution may issue upon this judgment forthwith.

A true copy attest:

THOS. SPEED, *Clerk.*

The President of the United States of America to the marshal of the western Kentucky district, Greeting:

S You are hereby commanded, that of the estate of Evening Post Company you cause to be made the sum of six thousand dollars, with interest thereon at the rate of six per centum per annum from the 30th day of April 1903 until paid, which Stuart R. Knott, lately in our circuit court of the United States of America, in the western district of Kentucky, sitting in Louisville, recovered against it for debt and also the sum of $15.75, which was adjudged the said Stuart R. Knott for his costs, by him in that behalf expended, whereof the said Evening Post Company is convict, as appears to us of record and that you have the same before the judges of our said circuit court of the United States for the western district of Kentucky, at Louisville, on the first Monday in July next, to render unto the said Stuart R. Knott his debt, interest and costs aforesaid, and have then there this writ.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Louisville, in the said district, this 26th day of May, in the year of our Lord 1903 and of our Independence the 127th.

[s. s.]

THOS. SPEED,
C. C. C., W. K. D.,
By HENRY F. CASSIN, *Deputy.*

A copy attest:
THOS. SPEED, *Clerk,*
By HENRY F. CASSIN, *D. C.*

Upon which execution the marshal made the following return:—"Received the within *fi. fa.* in Louisville, Ky., May 26th, 1903, at 2:45 o'clock p. m. Returned "no property found" out of which to make this *fi. fa.* or any part of same, this May 27th, 1903.

A. D. JAMES,
U. S. Marshal,
By W. A. BLACKBURN,
Chief Deputy.

A copy attest:
THOS. SPEED, *Clerk,*
By HENRY F. CASSIN, *D. C.*

9 Upon which bill there issued the following subpœna in chancery:—

The President of the United States of America to Evening Post Company, Columbia Finance & Trust Company, R. W. Knott, B. G. Boyle, E. Q. Knott, Greeting:

You are hereby commanded to appear before our circuit court of the United States of America, for the western district of Kentucky, at the Federal court hall in the city of Louisville, on the first Monday in July next, to answer a bill in equity exhibited against you in our said court, by Stuart R. Knott, which you shall in nowise omit, under the penalty of the law.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, and the seal of our said circuit court hereto affixed, at the clerk's office of said court, in Louisville, this 27th day of May A. D., 1903 and in the 127th year of our Independence.

Attest:
THOS. SPEED, *C. C. C., W. K. D.,*
By HENRY F. CASSIN, *His Deputy.*

MEMORANDUM.—The defendants are to enter their appearance in the suit in the clerk's office on or before the 6th day of July next, the day at which the writ is returnable, otherwise the bill may be taken as *pro confesso.*

THOS. SPEED, *Clerk,*
By HENRY F. CASSIN, *His Deputy.*

10 Upon which subpœna the marshal made the following return.

Received the within subpœna in chancery at Louisville, Ky., on May 27th, 1903. Executed same on "The Evening Post Company" by delivering a true copy hereof to R. W. Knott, president of said company, at his office in Louisville, Ky., May 27, 1903. Executed on R. W. Knott and E. Q. Knott by delivering a true copy hereof to each at Louisville, Ky., May 27, 1903. Executed on the Columbia Finance & Trust Company by delivering a true copy hereof to Attilla Cox, president of said company, at his office in Louisville, Ky.,

May 28, 1903. Executed on B. G. Boyle, in Louisville, Ky., May 28, 1903, by delivering a true copy hereof to him. This, therefore, returned executed in full, May 28, 1903.

A. D. JAMES,
U. S. Marshal,
By W. A. BLACKBURN,
Chief Deputy.

And on another day of said term of said court, to-wit, on May 27th, 1903, came the complainant by Humphrey, Burnett & Humphrey, his counsel, and moved the court for the appointment of a receiver herein to take charge and possession of all the property of the Evening Post Company, described in the bill of complaint as having for certain purposes been transferred to the defendant, The Columbia Finance and Trust Co., and thereupon it is ordered by the court that said motion be set for hearing before the court at 10 o'clock a. m. of Thursday, May 28th, 1903, and that the defendants be immediately notified thereof to the end that they may be heard thereon. Pending the hearing of said motion, it is ordered by the court that the said Columbia Finance and Trust Company be and it is restrained from disposing of any part of said property and from delivering possession of any part thereof to any person or officer otherwise than in such manner as may be approved by this court. A copy of this order shall be forthwith served upon the said Columbia Finance and Trust Co.

Upon which order the marshal made the following return:

"Received the within order in Louisville, Ky., May 27th, 1903. Executed same on the Columbia Finance and Trust Company by delivering a true copy of the within to Attilla Cox, president of said company, at his office in Louisville, Ky., May 27, 1903.

A. D. JAMES,
U. S. Marshal,
By W. A. BLACKBURN,
Chief Deputy.

And on May 28th, 1903, the following order was entered: Came the complainant by Humphrey, Burnett & Humphrey, his counsel.

Came also the defendants herein by Helm, Bruce & Helm,
11 their counsel, and filed their answers herein.

This day the cause came on to be heard on motion for the appointment of a receiver herein.

The defendants, Evening Post Company, R. W. Knott, B. G. Boyle and E. Q. Knott, having filed answer herein and consented to the appointment of a receiver of the property and assets of the Evening Post Company, and the Columbia Finance & Trust Company having filed its answer herein and consented that a receiver as prayed for might be appointed, and, further, that the title to all the property and assets of the Evening Post Company in its hands might be immediately vested in such receiver, and the court being advised, it is now ordered and decreed that Lewis C. Humphrey, be

and he is hereby appointed receiver herein, but before such appointment shall take effect, it is ordered that he shall execute bond in the sum of thirty thousand ($30,000.00) dollars with good and sufficient surety to be approved by the court.

The defendants herein are hereby directed to deliver forthwith to said receiver all the property of the Evening Post Company of every kind and description.

Said receiver is directed to report at once to this court some plan by which the publication of the afternoon newspaper called the Evening Post shall be continued.

Said receiver is directed to retain possession of the property of the Evening Post Company subject to the orders of this court.

Thereupon appeared Lewis C. Humphrey, who offered as his bondsman John M. Atherton, and such surety is hereby approved by the court.

Said receiver thereupon, with his surety, executed bond as required to this decree, and was sworn.

Thereupon, the receiver, in obedience to the above, filed his report by which it appears that the Columbia Finance and Trust Company as liquidator of the Evening Post Company has heretofore entered into a written contract with the Evening Post Company (incorporated May 12th, 1903) by which said company obligated itself to continue the publication of the newspaper known as the Evening Post, and it appearing from the receiver's report that a similar contract can be effected between him and said Evening Post Company, by which the publication of the said newspaper may be continued, it is now ordered and decreed that said receiver
12 be and he is authorized and empowered to enter into a contract with the said Evening Post Company similar in all respects to the contract between it and the Columbia Finance & Trust Company, liquidator.

The receiver is ordered to report his doings to the court.

The answer of the Evening Post Company *et al.* above referred to is as follows:

In the Circuit Court of the United States, Sixth Circuit, Western District of Kentucky.

STUART R. KNOTT, Complainant,
vs.
EVENING POST COMPANY, &c., Defendants. } Answer.

The defendants. The Evening Post Co., R. W. Knott, B. G. Boyle, and E. Q. Knott, consent to the appointment of a receiver herein for the Evening Post Co., and consent that the title to all the property and assets of said Evening Post Co. may immediately vest in and be transferred to such receiver as may herein be appointed.

HELM, BRUCE & HELM,
Counsel for the Above-named Def'ts.

The answer of the defendant, The Columbia Finance & Trust Company, above referred to, is as follows:

In the Circuit Court of the United States, Sixth Circuit, Western District of Kentucky.

STUART R. KNOTT, Complainant,
vs.
EVENING POST CO., &c., Defendants. } Answer.

The Columbia Finance & Trust Company, defendant herein, and the liquidator of the Evening Post Company, hereby acknowledges service of notice that an application for a receiver will be made on May 28th, 1903 at 10 o'clock a. m. before the Hon. Walter
13 Evans, judge, in the court room of the circuit court of the United States, sixth circuit, western district of Kentucky, in Louisville, Ky., and the Columbia Finance & Trust Company as liquidator hereby enters its appearance in the above cause, and says that as such liquidator it is endeavoring to discharge its duties. It consents to the appointment of a receiver and consents that the title to the assets of the Evening Post Company may be vested in him.

COLUMBIA FINANCE & TRUST COMPANY,
Liquidator of Evening Post Co.,
By ATTILLA COX, *President.*

The bond and oath of the receiver, above referred to, are as follows:—

Circuit Court of the United States, Western District of Kentucky.

STUART R. KNOTT
vs.
EVENING POST COMPANY ET AL.

Know all men by these presents, that we, Lewis C. Humphrey, as principal and J. M. Atherton as surety, are held and firmly bound unto the United States of America in the sum of thirty thousand dollars in lawful money of the United States, to be paid to the said United States of America for which payment well and truly to be made we bind ourselves, and heirs, executors, administrators and assigns, jointly and severally by these presents.

Signed and sealed this 28th day of May, 1903.

The condition of this obligation is such that whereas the said Lewis C. Humphrey has been duly appointed by the circuit court of the United States, for the western district of Kentucky, in the above entitled suit as receiver of the property of the said Evening Post Company as per order of this court, dated 28th day of May 1903.

Now therefore, if the said Lewis C. Humphrey shall honestly and faithfully perform his duties as such receiver then the foregoing obligation shall be void, otherwise to remain in full force and effect.

LEWIS C. HUMPHREY.
J. M. ATHERTON.

Taken and acknowledged before me this 28th day of May 1903.

THOS. SPEED,
14 *Clerk U. S. Circuit Court, Western District of Ky.*,
By HENRY F. CASSIN,
Deputy Clerk.

UNITED STATES OF AMERICA,
Western District of Kentucky, } *ss:*

The undersigned, having been appointed receiver in the case of Stuart R. Knott *vs.* The Evening Post Co. *et al.*, in the circuit court of the United States for the western district of Kentucky, does solemnly swear that he will faithfully discharge his trust as such receiver and obey the orders of the court in relation thereto.

LEWIS C. HUMPHREY.

Subscribed and sworn to before me, this 28th day of May, A. D. 1903.

HENRY F. CASSIN,
U. S. Commissioner.

The report of the receiver above referred to, is as follows:—

In the Circuit Court of the United States, Sixth Circuit, Western District of Ky.

STUART R. KNOTT, Complainant,
vs.
EVENING POST COMPANY, &c., Defendants. } Report of Receiver.

Now comes the receiver herein, Lewis C. Humphrey, and begs leav- to report to this honorable court, pursuant to order herein that he shall report some plan by which the afternoon newspaper called the Evening Post shall be continued, that heretofore, to-wit, on the 18th day of May, 1903, the Columbia Finance & Trust Company as liquidator of the Evening Post Company, entered into a written contract with the Evening Post Company, (incorporated May 12, 1903) by which said company obligated itself to continue the publication of the afternoon newspaper known as the Evening Post, and that said newspaper is now being published daily under and by virtue of said agreement, and a copy of said agreement, setting forth in detail the terms and conditions thereof is filed herewith marked Exhibit

A; and the receiver herein states that the parties to said
15 agreement or contract between the Evening Post Company and the Columbia Finance & Trust Company as liquidator, to-wit, Richard W. Knott, J. M. Atherton, B. G. Boyle, John R. Knott and Eugene Knott, have offered and agreed to enter into a similar contract and for similar purposes with your receiver; and your receiver respectfully recommends that he be permitted and authorized to enter into such a contract with said parties for the purpose of continuing the publication of the afternoon newspaper called the Evening Post *Company* until such time as said property may be sold and delivered pursuant to the decree of this court.

All of which is respectfully submitted.

LEWIS C. HUMPHREY, *Receiver.*

EXHIBIT "A" WITH RECEIVER'S REPORT.

This indenture made this 18th day of May, 1903, by and between the Columbia Finance & Trust Company, liquidator of the Evening Post Company, at the request of ninety-two per cent. of the stockholders of the Evening Post Company, the charter of which expired on May 1, 1903, of the first part, and the Evening Post Company, a corporation chartered and organized under the laws of Kentucky, with power to begin business on May 10, 1903, of the second part, witnesseth:

That the party of the first part has thi*d* day leased and does hereby lease all of the property and assets of every character of the old Evening Post Company to the new Evening Post Company, party of the second part, until the sale of the assets of the old company, in consideration of which lease the said party of the second part hereby agreed to and with the said party of the first part, liquidator, that it will assume and pay all of the costs of operating the property of the old Evening Post Company from May 1, 1903, until the date of the sale of the property of the said Evening Post Company and the delivery of the properties to the purchaser, and the said party of the second part further agrees that it will promptly deliver said property to the purchaser, whoever he may be in as good condition as it was on May 1, 1903, and hereby covenants with the party of the first part that none of the expenses of operating the property from May 1, 1903, nor of any depreciation that may occur in the property between May 1, 1903, and the date of the delivery of the property to the purchaser shall fall upon the liquidator, nor upon the assets which came into its hands under and by
16 virtue of the resolutions of the stockholders of the Evening Post Company, held on April 30, 1903.

(Signed) COLUMBIA FINANCE & TRUST CO.,
As Liquidator of the Evening Post Co.,
By ATTILLA COX, *Pres't.*

We, the undersigned, guaranty that the Evening Post Company, party of the second part above mentioned, will truly and faithfully carry out and comply with the terms of its covenants hereinabove set out.

(Signed) RICHARD W. KNOTT.
B. G. BOYLE.
J. M. ATHERTON.
JOHN R. KNOTT.
EUGENE KNOTT.

And on another day of said term of said court, to-wit, June 27th, 1903, on motion of complainant it is now ordered as follows:—

1. For special reasons, namely, his special qualifications for the particular work to be done, this cause is referred to Thos. Speed, as special commissioner, with directions to state the debts of the defendant, The Evening Post Company, and a full schedule of its assets.

2. The commissioner shall advertise for three insertions in the Louisville Herald and the Evening Post during his appointment as commissioner herein, and calling upon all persons having any claims against the Evening Post Company, to present them, duly proven, before him, such presentment to be made on or before July 10th, 1903. Debts represented by notes shall be proved by the oath of the claimant, those represented by open account by oath of the claimant and one other witness.

3. The receiver shall allow the commissioner to have full access to the books of the Evening Post for the purpose of approving claims which may be presented before him, and for the purpose of ascertaining what are its liabilities and assets.

The commissioner shall make his report to the court as soon as he shall be satisfied that all just demands against the Evening Post have been presented or notice received by them of this order.

And on another day of said term of said court, to-wit, July 6th, 1903, came Thos. Speed, special commissioner, and filed his report herein. It is ordered that said report do lie over ten days for exceptions.

17 And now on this 6th day of July, 1903, the intervening petition of the Louisville Trust Company as receiver of the Evening Post Company under an appointment and qualification by the Jefferson circuit court, chancery branch, first division, being before the court, upon consideration thereof and upon motion of Dodd & Dodd, and T. W. Spindle, solicitors for said petitioners, and Humphrey, Burnett & Humphrey, appearing for complainant, Stuart R. Knott, and resisting said motion and Helm, Bruce & Helm, appearing for the Home & Farm Publishing Co. *et al.*, also resisting the said motion.

It is now ordered that the prayer of the said petitioner to intervene herein to claim the estate of the Evening Post Company in the hands of Lewis C. Humphrey, receiver of this court, herein, be granted, and that the said intervening petition be and it is now filed as the

basis of the claim of the said Louisville Trust Company, receiver herein.

Thereupon, the said Louisville Trust Company, as such receiver, by Dodd & Dodd and T. W. Spindle, its solicitors, moved the court to vacate the order appointing Lewis C. Humphrey receiver herein, and to direct the said Lewis C. Humphrey to deliver, turn over and surrender to the said Louisville Trust Company, as receiver, of the Jefferson circuit court, chancery branch, first division, all of the estate and properties of the Evening Post Company in his custody, possession and control as receiver of this court herein, including the books, papers and documents pertaining to its business and affairs to which motion the complainant, Stuart R. Knott, by his counsel, and the Home & Farm Publishing Company, and others by their said counsel object, and said motion having been argued by counsel and the court not being advised thereof takes time.

The complainant excepts to the following parts of the intervening petition of the Louisville Trust Company upon the ground that they are irrelevant and impertinent, and ask that they be stricken out:

1. The following language in paragraph 5 beginning at the third line thereof: "And by the procurement and at the instance and request of the said Evening Post Company and the other defendants to the said State court proceeding."

2. The following language in paragraph 5, beginning at the eleventh line thereof:

"Your petitioner is informed and believes, and upon such information and belief states that the said suit was instituted at the instance and request of the defendant, Richard W. Knott, for
18 the express purpose of ousting the said State court from its previously acquired jurisdiction, and that in pursuance of the said purpose."

3. The following language in paragraph 5 beginning at the 23rd line thereof:

"The said Richard W. Knott, representing his said brother, Stuart R. Knott, the latter not then being, nor for some time previous having been in the State of Kentucky, caused"

4. The following language in paragraph 6 beginning at the first line thereof:

"For the purpose of ousting the said State court of its previously acquired and fully attached jurisdiction, as aforesaid."

5. The following language in paragraph 6, beginning at the fourth line thereof:

"By the procurement and at the instance and request of the said Richard W. Knott."

6. The following language in paragraph 6 beginning at the 18th line thereof:

"Without informing this court of the pendency of the said State court proceeding, and"

7. The following language in paragraph 6 beginning at the 23rd line thereof:

"In pursuance of the said purpose and scheme to oust the said

State court of its first attached and acquired jurisdiction as aforesaid."

8. The following language in paragraph 6 beginning at the 30th line thereof:

"Your petitioner states that the said defendants, and each of them, suppressed and withheld from this court any knowledge of the pendency of the said State court proceeding and of the fact that the said State court of concurrent jurisdiction with this court, had first acquired jurisdiction over the said trust estate and subject matter of the said litigation."

9. The following language in paragraph 7 beginning at the 18th line thereof:

"And your petitioner is advised and charges that the facts of the State court proceeding were suppressed by the said defendants, and each of them, from the knowledge of this court."

19 10. The following language in paragraph 9 beginning with the 10th line thereof:

"And that the sole and entire purpose of the complainant and defendants, in the institution and prosecution of this suit was and is to oust the said Jefferson circuit court, chancery branch, first division, of its lawful jurisdiction and to divest it of the lawful custody of the property and estate of the said Evening Post Company.

The intervening petition of the Louisville Trust Company, receiver, above referred to, is as follows:

20 Circuit Court of the United States for the Western District of Kentucky. In Equity.

STUART R. KNOTT, Complainant, *vs.* EVENING POST COMPANY ET AL.	Intervening Petition of the Louisville Trust Company, Receiver.

To the honorable circuit court of the United States for the western district of Kentucky, at Louisville, Kentucky:

Your petitioner, The Louisville Trust Company, as receiver of the Evening Post Company, respectfully shows as follows:—

I.

Your petitioner is a corporation duly incorporated, organized and existing under the laws of the State of Kentucky, and has been such for more than ten years last past. Your petitioner, by its charter and the general laws of Kentucky, is authorized and empowered to act as receiver, assignee, trustee, guardian, administrator and executor of trust estates confided to it, and as such has been duly appointed, qualified and is acting as receiver of all of the properties of the defendant, Evening Post Company.

II.

That the defendant, Evening Post Company, was specially chartered under the provisions of chapter 56 of the general statutes of Kentucky, with a capital stock of $60,000.00 and authorized to begin and did begin business as such corporation on May 1, 1878, and its said charter was limited to the period of twenty-five years, terminating May 1, 1903.

III.

That heretofore, to-wit: on April 30, 1903, all of the stockholders of the said Evening Post Company met and decided to terminate and liquidate the affairs and estate of the said Evening Post Company, and to that end adopted resolutions and transferred to the defendant, Columbia Finance & Trust Company, as trustee or liquidator, all of the estate and affairs of the said Evening Post
21 Company by the following instrument in writing:

"Whereas, the charter of the Evening Post Company will expire on the first day of May, 1903; and,

Whereas, it has become necessary to have all the assets of every character of the company sold for the purpose of paying its debts and distributing the surplus, if any, among the stockholders; and

Whereas, it is impossible to properly advertise and sell said property by the 1st of May, next; therefore, be it

Resolved, first. That the Columbia Finance and Trust Company be and it is hereby appointed liquidator of the affairs of the corporation, with directions to operate for the use of the stockholders the affairs and business of said corporation as they have been operated until the property can be properly advertised and sold and the possession thereof delivered to the purchaser.

Second. That prior to the said sale liquidator shall cause to be made for the use of the stockholders a comprehensive statement of the assets and liabilities of the corporation, and furnish said stockholders with a copy of said statement.

Third. That the said liquidator shall in its asvertisement specify the nature of the articles to be sold, and shall make such sale for cash to be paid on the delivery of possession, and shall require of the purchaser that he deposit a certified check for an amount equal to one-third of the total purchase price which the liquidator shall hold and credit upon the purchase price when the sale is consummated; or, if for any reason it shall be set aside, return to the bidder.

If the said bidder to whom the property is knocked down shall fail at once to deliver to the liquidator the certified check, as herein provided, the liquidator shall immediately re-sell the property and refuse to receive bids from said former bidder.

Fourth. Said liquidator may in his discretion employ an auctioneer or other agent necessary or proper to be used in the sale of the property.

Fifth. Until said sale, and during the operation of said property, said liquidator is given full authority and permission to employ

such agents and persons as may be necessary to properly, conveniently, and economically operate the property, and keep an account of all its expenses and take vouchers therefor. And after the property has been fully administered it shall make out a comprehensive account of its acts and doings, and shall furnish a copy thereof to each of the stockholders.

Sixth. The said liquidator shall from the proceeds of the sale of the property pay all the debts of the corporation, and the balance, if any, shall be distributed among the stockholders according to their legal rights."

Which said resolutions are also set forth in the bill of complaint herein.

Your petitioner states that the said defendant, Columbia Finance & Trust Company, accepted the said trust on the said 30th day of April, 1903, and undertook and agreed to execute and carry the same into effect. Your petitioner states that by the terms of the said trust the said Columbia Finance & Trust Company, as liquidator or trustee, was directed to speedily wind up and liquidate the said trust estate, and out of the proceeds thereof to first pay the debts of the said Evening Post Company and then distribute the balance among the stockholders according to their respective legal rights.

IV.

Your petitioner states that early in the forenoon of May 12, 1903, the estate of W. N. Haldeman, deceased, represented by Bruce Haldeman, Bennett H. Young and Elizabeth Haldeman, executors and executrix thereof, filed their petition in equity in the Jefferson circuit court, chancery branch, against the Evening Post Company, Columbia Finance & Trust Company, trustee of the Evening Post Company, Richard W. Knott, J. M. Atherton, John R. Knott, Eugene Q. Knott, and Laura G. Boyle, wherein, in appropriate language, they set forth that the estate of the said W. N. Haldeman, deceased, was the owner of 48 shares of the capital stock of the Evening Post Company of the par value of $100.00 per share; that the said defendants, together with the said plaintiffs, constituted all of the stockholders of the said Evening Post Company; that the said defendants also constituted all of the creditors of the said Evening Post Company so far as known to the said plaintiffs, and that there were no other stockholders or creditors interested in the said truste- estate than the said named parties so far as known to the said plaintiffs; that a necessity had arisen for the administration and liquidation of the said trust estate in a court of equity where the assets and liabilities could be properly marshaled and determined in manner and form as required by law, and that it was impracticable and impossible to have a fair, just and proper accounting and settlement of the business and affairs of the said Evening Post Company except in a court of equity.

The said petition, after setting forth at length the facts constituting the said cause of action and the necessity for the administration

and liquidation of the said trust estate in a court of equity, concludes with the following prayer:

"Wherefore, the premises considered the plaintiffs pray for a settlement of the accounts of the Evening Post Company, and of the Columbia Finance & Trust Company as liquidator thereof herein, and that this cause be referred to the commissioner of this court to audit, state and settle the accounts of the Columbia Finance & Trust Company, as trustee or liquidator of the affairs and business of the said Evening Post Company, that a full, true and correct accounting of the business and affairs of the said Evening Post Company, and of the liabilities against the same, be ascertained and reported, and the assets sold and disposed of and distributed amongst the parties thereto according to their respective interests.

Plaintiffs further pray that pending this action, and until the final liquidation of the affairs of the Evening Post Company and the sale of its plan- and assets, that the court herein determine as to whether or not the affairs of the said Evening Post Company should be continued in operation, and, if so, that the operation of the said plant be conducted under and subject to the orders of the court herein.

And the plaintiffs further pray that a mandatory preliminary order be entered herein commanding and directing the defendants, and each of them, to allow the plaintiffs reasonable access to and an examination of the books, papers, documents and affairs of the said Evening Post Company, including all documentary information in connection therewith which is in the possession of the defendants or any of them.

And the plaintiffs further pray for their costs herein expended, and for all such proper and equitable relief, as the nature of the case may demand."

24 Your petitioner states that process of summons was on the said 12th day of May, 1903, duly issued by the clerk of the said Jefferson circuit court on the said petition, addressed and delivered to the sheriff of Jefferson county, commanding him to summon the defendants aforesaid, and each of them, to appear and answer the said petition, which was promptly and duly served by the said sheriff upon each of them. Your petitioner states that such steps and proceedings were had in the said suit in the Jefferson circuit court, chancery branch, first division, as aforesaid, that afterwards, to-wit: on May 19, 1903, the said named defendants, and each of them, appeared and demurred to the said petition, and at the same time filed answers thereto, submitting themselves and the said trust estate to the jurisdiction of the said State court, and in the said answers the defendant, Columbia Finance & Trust Company, as trustee or liquidator, expressly alleged as follows:

"The defendant says it submits itself to the jurisdiction of the court and will, of course, promptly obey all orders of the court."

Your petitioner states that the hearing of the said cause was begun in the said Jefferson circuit court, chancery branch, first division, before the Hon. Shackelford Miller, chancellor thereof, on May 23rd, 1903, and consumed the said entire day, and there not being time

to complete the same on that date a further hearing was adjourned until Monday, May 25, 1903, at 10 o'clock a. m., when the said hearing was resumed and continued until after 4 o'clock p. m. on that day, when, at the instance and request of the said defendants and upon their motion a further hearing thereof was postponed until May 30, 1903. Your petitioner states that the jurisdiction of the said Jefferson circuit court, chancery branch, first division, over the said trust estate of the Evening Post Company and the administration thereof fully attached and was expressly recognized by the said defendants on and before May 23, 1903.

Your petitioner states that the issues raised in the pleadings by the parties in the said State court proceeding were fully completed and joined, and the said State court acquired and became vested with complete jurisdiction to administer, liquidate and marshal and settle the said trust estate on and before May 23, 1903.

25 V.

Your petitioner further states that on May 26, 1903, without any notice whatever to the plaintiffs in the said State court proceeding, and by the procurement and at the instance and request of the said Evening Post Company and the other defendants to the said State court proceeding, a certain action at law was instituted in this court by complainant, Stuart R. Knott against the said Evening Post Company for the recovery of a judgment against the said Evening Post Company in the sum of $6,000.00 with interest thereon from April 30, 1903, which could not, in due course, have been heard by this court until its October term 1903.

Your petitioner is informed and believes, and upon such information and belief states that the said suit was instituted at the instance and request of the defendant, Richard W. Knott, for the express purpose of ousting the said State court from its previously acquired jurisdiction, and that in pursuance of the said purpose the said Richard W. Knott forthwith entered the appearance of the said Evening Post Company and consented, in writing, that the said Stuart R. Knott might forthwith take judgment against the said Evening Post Company for his said demand. Your petitioner states that by virtue of the said written consent of the said defendant, Richard W. Knott, this court did thereupon enter a judgment in accordance with the prayer of the said petition, upon which the said Richard W. Knott, representing his said brother, Stuart R. Knott, the latter not then being, nor for some time previous having been in the State of Kentucky, caused an execution to be issued on the said judgment and forthwith returned no property found, all of which will more fully appear by reference to the record of the said cause in this court, which is here referred to and made a part hereof.

VI.

Your petitioner further states that for the purpose of ousting the said State court of its previously acquired and fully attached juris-

diction, as aforesaid, the said Stuart R. Knott did, on May 27, 1903, by the procurement and at the instance and request of the said Richard W. Knott, institute and file in this court his creditor's bill against the said Evening Post Company, the Columbia Finance & Trust Company, R. W. Knott, B. G. Boyle and E. Q. Knott, wherein he sought to have this court seize, sequestrate and take hold of the estate, property and affairs of the said Evening Post Com-
26 pany, all of which was done without any notice whatever to the plaintiffs in the said State court proceeding, or to the general public. Your petitioner states that in and by the said bill, in the nature of a creditor's bill, the said Stuart R. Knott sought to have this court appoint a receiver to administer and liquidate the said trust created by the resolutions of April 30, 1903, as aforesaid, and sought to have this court assume and take full and complete jurisdiction of the identical subject-matter and trust estate involved in the said State court proceeding, all of which was done without informing this court of the pendency of the said State court proceeding, and without any notice whatever to the plaintiffs, or any one representing them in the said State court suit.

Your petitioner states that in pursuance of the said purpose and scheme to oust the said State court of its first attached and acquired jurisdiction, as aforesaid, the said defendants, Evening Post Company, R. W. Knott, B. G. Boyle, E. Q. Knott and The Columbia Finance & Trust Company, forthwith entered their appearance and consented to the granting of the prayer of the said petition, and to the appointment of a receiver of the said property. Your petitioner states that the said defendants, and each of them, suppressed and with-held from this court any knowledge of the pendency of the said State court proceeding, and of the fact that the said State court, of concurrent jurisdiction with this court, had first acquired jurisdiction over the said trust estate and subject-matter of the said litigation.

VII.

Your petitioner further states that without notice to the plaintiffs in the said State court proceeding, or to any one, except the said Stuart R. Knott, Evening Post Company, Columbia Finance & Trust Company, Richard W. Knott, B. G. Boyle and E. Q. Knott, and without any hearing from anybody adversely interested, this court did on or about May the 27th or 28th, 1903, enter an order appointing and qualifying one Lewis C. Humphrey, as receiver of the said entire trust estate of the Evening Post Company, and of the books, documents, papers and affairs pertaining thereto, and did further, in like manner, enter an order leasing the said entire trust estate to the Evening Post Company, which said decree and orders are here referred to and made parts hereof.

27 Your petitioner states that the said Lewis C. Humphrey was at that time, is now, and has been for a long time past an employé of the said Evening Post Company, defendant to the said State court proceeding, and that the said entire procedure was had

and taken without notice to the plaintiffs in the said State court proceeding; and your petitioner is advised and charges that the facts of the said State court proceeding were intentionally suppressed by the said defendants, and each of them from the knowledge of this court.

VIII.

Your petitioner states that the said Jefferson circuit court, chancery branch, first division, was in the practical and potential possession of the subject-matter of the estate of the said Evening Post Company at all times from and after May the 19th, 1903, and that to enable the said State court to grant any of the relief sought in the said State court suit it became absolutely necessary and indispensable that the said State court should take and assume actual possession of the said trust estate of the said Evening Post Company and administer, marshal and liquidate the same according to the prayer of the petition in the said State court.

Your petitioner states that the said State court, having first acquired jurisdiction of the property and affairs of the said Evening Post Company, as aforesaid, and being in the practical and potential possession of the subject-matter of the said suit, is entitled to retain it to the end without interference or hinderance on the part of this or any other court of concurrent jurisdiction; that the jurisdiction of the said State court, acquired as aforesaid, is exclusive of the subsequently acquired jurisdiction of this court over the same subject-matter and trust estate, and that being thus in the prior possession of the said subject-matter the said State court duly entered an order appointing your petitioner receiver and directed it to claim and take possession and charge of the said entire trust estate, as set forth in the resolutions of April 30, 1903, as aforesaid, and also in section 561 Kentucky Statutes, and your petitioner duly qualified by executing bond in the sum of $40,000.00, and taking the oath required by law.

Your petitioner states that by further order of the said State court your petitioner was directed, in conformity with that spirit of comity which exists between State and Federal courts of concurrent
28 jurisdiction, to intervene in this suit and claim the said entire trust estate, and to move this court to direct its receiver, Lewis C. Humphrey, to surrender and turn over to your petitioner all of the properties of every kind, character and description of the said Evening Post Company, including its books, papers and documents pertaining to its business.

Your petitioner exhibits and files herewith and makes a part hereof, as fully as if literally incorporated herein, a certified transcript of the pleadings, motions, orders and opinions of the State court in the said suit of Haldeman, *et al.*, *vs.* Evening Post Company, *et al.*, and marks the same "Exhibit A"

IX.

Your petitioner respectfully represents and states that the said Lewis C. Humphrey, receiver of this court, appointed as aforesaid holds the said properties against the lawful custody and possession of your petitioner; that the jurisdiction of the Jefferson circuit court, chancery branch, first division, over the said estate of the said Evening Post Company accrued and was lawfully exercised and assumed by the said State court before this court acquired any jurisdiction whatever; that the said Jefferson circuit court, chancery branch, first division, is a court of equity of concurrent jurisdiction with this court, and that the sole and entire purpose of the complainant, and defendants in the institution and prosecution of this suit, was and is to oust the said Jefferson circuit court, chancery branch, first division, of its lawful jurisdiction, and to divest it of the lawful custody of the property and estate of the said Evening Post Company, and that the subject-matter of controversy in the said cause in the State court is identical with the subject-matter of controversy in this suit.

Your petitioner states that if this court, through its receiver aforesaid, continues in the custody, possession and control of the said estate of the Evening Post Company the effect thereof will be to supersede and deprive the said Jefferson circuit court, chancery branch, first division aforesaid, of its right to proceed, try and determine the cause of action therein asserted, involving identically the same subject-matter and the administration and liquidation of identically the same trust estate between the same parties.

29 Your petitioner is informed and advised, and therefore states that the jurisdiction of the Jefferson circuit court, chancery branch, first division, of the subject matter in controversy herein is prior and paramount to the exercise of any jurisdiction of this court over the same subject-matter, and that the jurisdiction of the said State court over the said subject-matter is exclusive of the jurisdiction of this court.

Wherefore, your petitioner prays permission to file the foregoing pleading in obedience to the express directions of said State court, and that this court enter an order vacating its order appointing Lewis C. Humphrey, receiver, and directing the said Lewis C. Humphrey to turn over, surrender and deliver to your petitioner all of the estate and properties of the said Evening Post Company of every kind, character and description, including its books, papers, accounts and documents pertaining to its business, to the end that the said trust estate shall be administered, closed and wound up by the said Jefferson circuit court, chancery branch, first division, in manner and form as required by law; and to the further end that so far as the said trust estate is concerned further proceedings in this suit shall be stayed, suspended and abated and the hands of this court held in abeyance until the said State court, first obtaining jurisdiction, has terminated the case pending before it. Your petitioner prays for its costs herein expended, and for all such proper and equitable

relief, both general and special as the nature of the case may demand.

DODD & DODD,
KOHN, BAIRD & SPINDLE,
Counsel for Petitioner.

H. V. Loving says he is president of the Louisville Trust Company, and that the statements contained in the foregoing petition are true to the best of his knowledge, information and belief.

H. V. LOVING.

Subscribed and sworn to, before me, by H. V. Loving, this the 3rd day of July, 1903. My commission expires 2/10/1906.

E. L. BOWIE,
Notary Public, Jefferson County, Kentucky.

30 The petition in the case of Stuart R. Knott *vs.* Evening Post Company, referred to in the intervening petition of Louisville Trust Company, receiver, is as follows:—

Circuit Court of the United States, Sixth Circuit, Western District of Kentucky.

STUART R. KNOTT, Plaintiff,
vs.
EVENING POST COMPANY, Defendant.
} Petition in Ordinary.

The plaintiff, Stuart R. Knott, states that he is a citizen and resident of the State of Missouri; that the defendant, The Evening Post Company is a corporation duly created by and organized under the laws of the State of Kentucky, and a citizen and resident of said State; that the amount in controversy herein exceeds the sum of $3,000.

1. Plaintiff states that heretofore, to wit on July 1, 1896, the defendant, by its promissory note dated that day, which it executed and delivered to the plaintiff, agreed and promised to pay to this plaintiff, one day after date the sum of one thousand ($1,000.00) dollars; that said note has long since become due; that demand has been made by the plaintiff of the defendant for its payment but no part thereof has been paid except that interest has been paid up to the 30th day of April, 1903, leaving still due thereon the sum of $1,000.00 with interest from the 30th day of April, 1903. Said note is filed herewith as part hereof marked A. B.

2. Plaintiff further states that by another promissory note dated July 1, 1897, which defendant executed and delivered to plaintiff, the defendant agreed and promised to pay to this plaintiff, on demand, the sum of one thousand ($1,000.00) dollars; that said note has long since been due; that demand has been made by the plaintiff of the defendant for its payment but no part thereof has been

paid except that interest has been paid up to April 30, 1903, leaving still due thereon the sum of $1,000.00, with interest from the 30th day of April, 1903. Said note is filed herewith as part hereof marked C. D.

3. Plaintiff further states that by another promissory note, dated January 1, 1903, which defendant executed and delivered to the plaintiff, the defendant agreed and promised to pay to this plaintiff,
31 on demand, the sum of four thousand ($4,000.00) dollars; that said note has become due; that demand has been made by the plaintiff of the defendant for its payment but no part thereof has been paid except that interest has been paid up to April 30, 1903, leaving still due thereon the sum of $4,000.00, with interest from the 30th day of April, 1903. Said note marked E. F. is filed herewith as part hereof.

Wherefore plaintiff prays judgment against the said defendant for the said sum of $1,000.00, with interest at 6 per centum per annum from April 30, 1903, until paid; and for $1,000.00, with interest at 6 per centum per annum from April 30, 1903, until paid, and for $4,000.00, with interest from April 30, 1903, at 6 per centum per annum, until paid.

HUMPHREY, BURNETT & HUMPHREY,
For Pl'ff.

The answer of the defendant to said petition is as follows:—

Circuit Court of the United States, Sixth Circuit, Western District of Kentucky.

STUART R. KNOTT, Plaintiff,
vs.
EVENING POST COMPANY, Defendant. } Answer.

The defendant, The Evening Post Company, admits that the allegations contained in the petition of the plaintiff are true, and consent that this case may be submitted for judgment.

EVENING POST CO.,
By RICHARD W. KNOTT, *President.*

The judgment and execution in this case have heretofore been copied on pages 7 and 8 of this record.

Exhibit "A" referred to in the intervening petition of the Louisville Trust Company, receiver, is as follows:—

32 $34 244.

STATE OF KENTUCKY, }
County of Jefferson. }

Pleas before the Honorable Shackelford Miller, judge of the Jefferson circuit court, chancery branch, first division, at the court house, in the city of Louisville, county and State aforesaid, and on the dates hereinafter mentioned.

BRUCE HALDEMAN, &c., Plaintiffs,
vs.
EVENING POST COMPANY, &c., Defendants. } Transcript of Record.

Be it remembered, that, heretofore, to-wit on the 12th day of May, 1903 came plaintiffs, by counsel and filed their petition and five exhibits herein.

Said petition is in words and figures as follows, to-wit:

Jefferson Circuit Court, Chancery Branch, — Division.

BRUCE HALDEMAN, BENNETT H. YOUNG, and ELIZABETH Haldeman, Executors and Executrix under the Will of W. N. Haldeman, Deceased, Plaintiffs,
vs.
EVENING POST COMPANY, COLUMBIA FINANCE & TRUST Company, Trustee of the Evening Post Company; Richard W. Knott, J. M. Atherton, John R. Knott, Eugene Q. Knott, and Laura G. Boyle, Defendants. } Equity.

33 The plaintiffs state that they are the executors and executrix under the will of W. N. Haldeman, deceased, duly qualified and performing the duties as such personal representatives, and that the said W. N. Haldeman departed this life in 1902, a citizen of Jefferson county, Kentucky, and his said will was duly admitted to probate in said county.

They state that the defendants, Evening Post Company and The Columbia Finance & Trust Company, are corporations duly organized and created under the laws of Kentucky.

They state that heretofore, to-wit: on the — day of June, 1898, their testator acquired and became the owner and left at his death as a part of his estate 48 shares of the capital stock in the defendant, Evening Post Company, which said 48 shares of stock duly came into and *is* now in their hands as a part of the personal estate of the said testator.

They state that the defendant, Evening Post Company, was duly incorporated under the laws of Kentucky on May, 1, 1878, and that the original articles of incorporation were amended on the 14th day of February, 1879, and again on the 2nd day of February, 1881.

They file herewith and make a part hereof a copy of the said original and amended articles of incorporation marked "Exhibit A."

They state that under the said articles as amended the capital stock of the said corporation was limited to $60,000.00, divided into shares of $100.00 each, all of which was issued and disposed of, and that the defendant, Richard W. Knott, claims that he is the owner of $42,700.00; the defendant J. M. Atherton, claims that he is the owner of $6,500.00; the defendant, Laura G. Boyle, claims that she is the owner of $5,000.00; the defendant, John R. Knott, claims that he is the owner of $500.00, and the defendant, Eugene Knott, claims that he is the owner of $500.00 of said stock.

They state that by the terms of the said articles of incorporation, as amended, the same was limited to the period of 25 years from May 1, 1878, expiring on May 1, 1903.

They state that the individual defendants are, and have been for many years, the president, managing officers and directors of the said corporation, and have run and operated the same as though it was their own private property, without any meeting of the stockholders, or election of directors, as provided for in said char-
34 ter, and without any meeting whatever of the stockholders to elect directors.

They state that being informed and advised about April the 25th, 1903, that the said charter was about to expire by its own terms they repeatedly demanded verbally, and in writing, and their said demands were absolutely and positively refused and denied by the defendants and each of them, the right as a stockholder to inspect and examine the books and affairs of the said company with a view of determining what course they would be justified in taking in relation thereto.

They state that they have also repeatedly demanded a statement or statements of the assets and liabilities of the said corporation, of what the assets consist, the original cost price thereof, and at what figures they were carried on their books; and also a detailed statement of the liabilities of the said company, when they were incurred, how they were evidenced and when they had matured or would mature and to whom they were due and how secured, if secured at all, all of which demands were also and have continuously been refused and denied to them.

They state that a meeting of the stockholders was called by the defendants for April 30, 1903, which they attended, and at which they again demanded the aforesaid information and rights, and were denied the same. They state that at the said meeting the defendant offered and caused to be passed over their protest and objection, the following resolutions:

"Whereas, the charter of the Evening Post Company will expire on the first day of May, 1903; and,

Whereas, it has become necessary to have all the assets of every character of the company sold for the purpose of paying its debts and distributing the surplus, if any, among the stockholders; and,

Whereas, it is impossible to properly advertise and sell said property by the 1st of May, next; therefore, be it

Resolved, first. That the Columbia Finance and Trust Company be and it is hereby appointed liquidator of the affairs of the corporation, with directions to operate for the use of the stockholders the affairs and business of said corporation as they have been operated until the property can be properly advertised and sold and the possession thereof delivered to the purchaser.

Second. That prior to the said sale the liquidator shall cause to be made for the use of the stockholders a comprehensive state-
35 ment of the assets and liabilities of the corporation, and furnish said stockholders with a copy of said statement.

Third. That the said liquidator shall in its advertisement specify the nature of the articles to be sold, and shall make such sale for cash to be paid on the delivery of possession, and shall require of the purchaser that he deposit a certified check for an amount equal to one-third of the total purchase price which the liquidator shall hold and credit upon the purchase price when the sale is consummated; or, if for any reason it shall be set aside, return to the bidder.

If the said bidder to whom the property is knocked down shall fail at once to deliver to the liquidator the certified check, as herein provided, the liquidator shall immediately re-sell the property and refuse to receive bids from said former bidder.

Fourth. Said liquidator may in his discretion employ an auctioneer or other agent necessary or proper to be used in the sale of the property.

Fifth. Until said sale, and during the operation of said property, said liquidator is given full authority and permission to employ such agents and persons as may be necessary to properly, conveniently and economically operate the property, and keep an account of all its expenses and take vouchers therefor And after the property has been fully administered it shall make out a comprehensive account of its acts and doings, and shall furnish a copy thereof to each of the stockholders.

Sixth. The said liquidator shall from the proceeds of the sale of the property pay all the debts of the corporation, and the balance, if any, shall be distributed among the stockholders according to their legal rights."

A certified copy of the proceedings of said meeting is herewith filed and made a part hereof, marked "Exhibit B."

They further state that after the passage of the aforesaid resolutions, and on the same date, the defendant, Columbia Finance & Trust Company, qualified as liquidator and has ever since been acting as such.

They state that thereupon they renewed their demands previously made of the defendant, Evening Post Company, and its offi-
36 cers, on the said Columbia Finance & Trust Company, as liquidator and trustee under the said resolutions, and that the said Columbia Finance & Trust Company has denied and refused, and still denies and refuses to grant them, or any one of them, any of the said demands.

They allege that they do not know, and are not advised what indebtedness, if any, the said Evening Post Company owes, to whom it owes the same, nor how same was created, nor how it is secured nor are they advised of what assets the said Evening Post Company owns, nor of any of the details thereof.

They state that they can only obtain such information by an inspection and examination of the books of the said company, and that the books of the said company are in the possession and under the control of the individual defendants, who positively refuse to allow the plaintiffs any access thereto or any statement of the contents thereof.

They are informed and believe that the defendants are still engaged in conducting and operating the business of the said Evening Post Company, and that the same is being operated at a great loss and expense.

They aver and charge that they have the legal right to inspect, at reasonable times, the books and affairs of the said Evening Post Company, and to ascertain its financial condition, and that the defendants, and each of them, have wrongfully denied them the said right, and have further wrongfully refused to furnish them any statements of the assets and liabilities accordingly as demanded of them, as aforesaid.

They state that the defendant, Columbia Finance & Trust Company, as liquidator, or trustee, has advertised and is advertising in the said Evening Post a printed notice calling upon the creditors thereof to present their claims, properly proven, before it on or before June 1, 1903, as will more fully appear by printed copy of the said notice which is herewith filed and made a part hereof, marked "Exhibit C."

They are informed, advised and charge that the individual defendants have taken over and converted to their own use, and are now using in violation of plaintiffs' rights, all of the assets of the Evening Post Company, including its good-will &c., and to that end have converted to their own use, or are about to convert to their own use, the entire assets of every kind and description, in-
37 cluding good-will and name of the said Evening Post Company, to the exclusion of the plaintiffs:

They state that in law and equity, and good conscience they are entitled to an inspection of the books and affairs of the said Evening Post Company; that they have repeatedly presented themselves and demanded the right to a full inspection and examination of the books and affairs of the said Evening Post Company, and have been uniformly denied any inspection whatever, or any investigation whatever, and have been refused any and all information pertaining thereto.

They state upon belief that the assets of the said Evening Post Company are, or should, in right and law and equity, be of the value of at least $60,000.00, and that the maximum liabilities under its charter should not and could not exceed the sum of $40,000.00, but they do not know, and cannot state what the assets or the liabil-

ities are, or whether there are any liabilities other than the outstanding stock of the said corporation.

Plaintiffs further state and charge, upon information and belief, that, notwithstanding the fact that the charter limitation on the indebtedness which the defendant, Evening Post Company, could incur was $40,000.00, the total indebtedness of said company is claimed by the individual defendants to be about $109,000.00, and that the individual defendants, named herein, constitute all, or nearly all, of the creditors of the said Evening Post Company, and that the said individual defendants are claiming that the said Evening Post Company is indebted to them in or about in the sum of $109,000.00.

Plaintiffs state that the books, papers and accounts of the defendant, Evening Post Company, contain and show, or should contain and show, the origin and nature of the transactions out of which said indebtedness aforesaid grew, and that without an inspection of all of said books and accounts and the original entries, documents and papers concerning the same, it will be impossible for these plaintiffs to be advised as to how much of said indebtedness constitutes a true and valid liability and obligation against the defendant, Evening Post Company, and they state and charge, on information and belief, that on an inspection of the books and papers of the Evening Post Company and of the original entries and documents concerning said indebtedness aforesaid a great part of said indebtedness can be proved and shown not to be true and valid obligations, or liabilities of the said Evening Post Company, and they further state that,

38 notwithstanding these facts, and notwithstanding the fact that the individual defendants and alleged creditors, as aforesaid, have been the managing agents of the Evening Post Company and in control of its affairs and books, they, and each of them have denied and refused these plaintiffs an inspection or view of the said books papers, entries and documents aforesaid.

Plaintiffs state that to the end that the affairs of the said Evening Post Company may be wound up and liquidated fairly and justly, and to the end that the true creditors thereof and the stockholders may be fairly dealt with according to law, a view and inspection of all of its books, papers documents and accounts is necessary. They further state that the necessary information for the purpose aforesaid cannot be obtained from a transcript or copy of said books, papers or accounts, or from the conclusion or statement of an examiner or book-keeper.

Plaintiffs further state that the individual defendants, as they are informed and believe, claim to be all of the creditors of the Evening Post Company, and there are no other persons claiming to be creditors of said company known to these plaintiffs, nor to any of them, and they hereby and now call upon the said individual defendants to set up and prove herein their said respective claims as creditors against the said Evening Post Company, to the end that the affairs of said company may be liquidated and settled in this suit.

Plaintiffs state that it is impracticable and impossible to have a fair, just and proper accounting and settlement of the business and

affairs of the said Evening Post Company except herein, and that in view of the persistent conduct of the defendants, hereinabove set out, they will not and cannot be advised or informed of the assets and liabilities of the said company until the defendants are compelled to furnish such information herein, and are compelled to allow the plaintiffs to inspect and examine the books, accounts and affairs of the said Evening Post Company.

Plaintiffs state that the individual defendants are claiming and asserting that there is a great value attached to the good will, name and the operated plant of the Evening Post Company, including the telegraphic and other correspondent facilities built up, acquired or established by it, which would be endangered and probably lost if the publication of the said newspaper by it were abandoned, and in order to maintain, preserve and get the benefit of the said great value, as claimed by them, that the said paper should be operated pending the closing up and liquidation thereof, to the end
39 that its good-will, name and facilities aforesaid may be sold to the best advantage.

But these plaintiffs state and charge that they are not informed, and have no means of knowing, as to what the value of the aforesaid good-will, name and facilities *are*, or as to whether or not there is any value thereto, and cannot have or form an opinion touching the same without a full and free inspection of the papers, documents, books and accounts of the said Evening Post Company.

Wherefore, the premises considered the plaintiffs pray for a settlement of the accounts of the Evening Post Company, and of the Columbia Finance & Trust Company as liquidator thereof herein, and that this cause be referred to the commissioner of this court to audit, state and settle the accounts of the Columbia Finance & Trust Company, as trustee or liquidator of the affairs and business of the said Evening Post Company; that a full, true and correct accounting of the business and affairs of the said Evening Post Company, and of the liabilities against the same, be ascertained and reported, and the assets sold and disposed of and distributed amongst the parties thereto according to their respective interests.

Plaintiffs further pray that pending this action, and until the final liquidation of the affairs of the Evening Post Company and the sale of its plant and assets, that the court herein determine as to whether or not the affairs of the said Evening Post Company should be continued in operation, and, if so, that the operation of the said plant be conducted under and subject to the orders of the court herein.

And the plaintiffs further pray that a mandatory preliminary order be entered herein commanding and directing the defendants, and each of them, to allow the plaintiffs reasonable access to and an examination of the books, papers, documents and affairs of the said Evening Post Company, including all documentary information in connection therewith which is in the possession of the defendants or any of them.

And the plaintiffs further pray for their costs herein expended,

and for all such proper and equitable relief, as the nature of the case may demand.

KOHN, BAIRD & SPINDLE,
DODD & DODD,
Attorneys for Plaintiffs.

40 Affiants, Bruce Haldeman and Bennett H. Young, say that the statements contained in the foregoing pleading are true as they verily believe.

BENNETT H. YOUNG.
BRUCE HALDEMAN.

Subscribed and sworn to, before me, by Bruce Haldeman and Bennett H. Young, this the 12th day of May, 1903. My commission expires at end of session of senate.

M. B. ROBSON,
Notary Public, Jefferson County, Kentucky.

At a court held on the 19th day of May, 1903:

Came plaintiffs by counsel and filed written notice duly executed on the defendants, and pursuant thereto moved the court for a mandatory order commanding and directing the defendants, and each of them, to allow the plaintiffs, their counsel and accountant, reasonable access to and inspection of the books, records and documents of the Evening Post Company touching its assets, liabilities and business affairs; to which the defendants object.

And it is ordered that said motion be and it is assigned to the 23rd inst. for hearing.

At a court held on the 23rd day of May, 1903:

Came parties, by counsel, and by agreement, upon written motion filed, it is ordered that the testimony to be taken in this action shall be taken by Alonzo Walker, the official stenographic reporter of this court, upon notice to counsel of record, and this case is now referred to him for that purpose.

Came plaintiffs and filed the respective affidavits of Bennett H. Young and Bruce Haldeman, and also filed an exhibit "Finance Statement of the Evening Post Company" herein.

Came the defendants and filed a demurrer to the petition herein.

Came the defendants, Richard W. Knott, J. M. Atherton, John R. Knott, Eugene Q. Knott and Laura G. Boyle, and filed their answer and Exhibits "A" and "B" herein. Came the defendant, The Columbia Finance and Trust Company, and filed its answer
41 herein, and also filed seven exhibits with said answer.

And this action having been heard in part, it is ordered that said action be and it is postponed to the 25th inst. for further hearing.

Said demurrer filed herein on the 23rd day of May, 1903, is as follows, to-wit.

Jefferson Circuit Court, Chancery Branch, First Division.

BRUCE HALDEMAN, BENNETT H. YOUNG, and ELIZABETH HALDEMAN, Executors and Executrix of the Will of W. N. Haldeman, Deceased, Plaintiff-,

vs.

EVENING POST COMPANY, COLUMBIA FINANCE & TRUST COMPANY, Richard W. Knott, J. M. Atherton, John R. Knott, Eugene Q. Knott, and Laura G. Boyle, Defendants.

The defendants demur to the petition of the plaintiffs because the same is insufficient in law, and fails to state a cause of action against them or any of them.

Said answer of Richard W. Knott, etc., filed herein on the 23rd day of May, 1903, is as follows, to-wit:

Jefferson Circuit Court, Chancery Branch, — Division.

BRUCE HALDEMAN, BENNETT H. YOUNG, and ELIZABETH HALDEMAN, Executors and Executrix under the Will of W. N. Haldeman, Deceased, Plaintiffs,

vs.

THE EVENING POST COMPANY, RICHARD W. KNOTT, J. M. ATHERTON, John R. Knott, Eugene Q. Knott, and Laura G. Boyle, &c., Defendants.

The defendants, Richard W. Knott, J. M. Atherton, John R. Knott, Eugene Q. Knott and Laura G. Boyle, for answer to the petition, say they have no knowledge or information sufficient to form a belief as to when the plaintiff's testator acquired or became the owner of the forty-eight or any shares of the stock of the Evening Post Company, or that said testator ever did become the owner
42 thereof, or any part thereof, or as to whether at his death he left said stock or any part thereof, as a part of his estate, or as to whether said stock or any part thereof ever came into the hands of plaintiffs as executors of the will of said W. N. Haldeman, deceased.

The defendants deny that they are or that all of them were either president, managing officers or directors of the corporation. The only ones of the defendants who ever were officers or directors are R. W. Knott, B. G. Boyle, and Eugene Q. Knott, except that at one time J. M. Atherton was a director for a few months.

They say they have operated the property for its best interests and while it is true that there have not been frequent meetings of either the stockholders or the directors yet the officers and directors of the company have at all times been ready and willing to call a meeting if it had been desired by any stockholder. It is true

that about the — day of April, 1903, a certificate for forty-eight shares of stock which up to that time for several years had been in the name of one James Gaines a negro, was presented at the office of the Evening Post Company, properly endorsed with the request that it be cancelled and a new certificate issued in the name of the plaintiffs as the executors of the will of W. N. Haldeman, and it was done.

Defendants deny that the demands either oral or written of the plaintiffs for a statement of the assets and liabilities of the company were ever denied to them, but it is true that the request that Mr. Milton, the father-in-law of Mr. Bruce Haldeman, should look into the books, papers and records of the corporation was denied. It is also true that the plaintiffs on the 28th day of April, demanded in writing that the executors be allowed to inspect the books of account and assets of the corporation, and that in response to that request the defendants stated they had no objection to a balance sheet however carefully or in detail prepared being taken from the books for the purpose of showing the value of the assets of the company, but declined to allow the executors to look into the intimate affairs of the corporation on the ground that they owned and controlled the Courier Journal Company and the Louisville Evening Times, rival corporations, and that the information was desired not for the purpose of conserving their small interest in the Evening Post Company, but for the uses and purposes of the Courier Journal
Company and the said Louisville Evening Times and
43 against the real interests of the owners of the Evening Post
Company and for the purpose of depreciating the value of the property, and defendants say that was the purpose.

Defendants say that on May 1st, 1903 all of the stockholders of the Evening Post Company met and by a vote of 552 shares of stock against 48 shares committed the assets of the said Evening Post Company into the hand- of the defendant, The Columbia Finance & Trust Company, with directions to the liquidator,

First. To operate for the use of the stockholders *of* the affairs and business of the corporation as they have been operated until the property can be properly advertised and sold and the possession thereof delivered to the purchaser.

Second. That prior to the sale the liquidator should cause to be made for the use of the stockholders a comprehensive statement of the assets and liabilities of the corporation, and furnish each stockholder with a copy of the statement.

Third. That the liquidator should in his advertisement specify the nature of the articles to be sold, and should make such sales for cash to be paid on delivery of possession, and should require of the purchaser that he deposit a certified check for an amount equal to one-third of the total purchase price which the liquidator should hold and credit upon the purchase price when the sale is consummated, or if for any reason it shall be set aside, to return the same to the bidder, Further providing that if the bidder should not comply with the terms of sale the property should be re-sold, and fur-

ther gave the liquidator discretion as to employing necessary agents in the operation and sale of the property, and directing the liquidator after paying off all the debts of the corporation to distribute the surplus, if any, among the stockholders.

At that meeting the plaintiffs as executors of W. N. Haldeman, protested against the execution of the resolution and against the continued publication of the Post, because they had information that the Post had been losing money and for other reasons. A copy of the minutes of said meeting is filed herewith as part hereof marked A.

Defendants further say that on May 1st 1903, the plaintiffs through their attorneys, Mess. Dodd & Dodd, made a de-
44 mand in writing upon the Columbia Finance & Trust Company as liquidator aforesaid, to make certain character of statements of liabilities, and the said company as liquidator aforesaid conceded the request in the very terms it was made, and then on the 2nd of May, 1903, the plaintiffs through the said attorneys changed their request and asked certain additional things to be stated, and the said Columbia Finance & Trust Company, liquidator aforesaid, in writing conceded that request exactly in the terms it was made, and then on May 7th, 1903 the said plaintiffs through the same attorneys demanded that Mr. Bruce Haldeman be granted the right to inspect and examine into the books and affairs of the Evening Post Company, and this request was denied by the liquidator upon the ground that it was contrary to the resolution adopted by the stockholders. In doing so the plaintiffs were informed that Mr. W. S. Parker an expert accountant was then hard at work under the employment of the liquidator for the purpose of taking off such a statement of assets and liabilities as had been requested by the plaintiffs through their attorneys and that as soon as Mr. Parker furnished the statement it would be furnished to them, and the said statement was furnished to them within a day or two thereafter, and they had full information of the assets and liabilities of the Evening Post Company at the time they brought their suit. That said statement shows every fact requested by the plaintiffs shows completely the assets and liabilities, of what the assets consist, *of* what was the original cost price and at what figures the assets are carried on the books, also a full statement of the liabilities with the exception of certain judgments which have been obtained in libel suits, and which have not yet been placed upon the books, because they were not as yet recognized as liabilities. A copy of said statement of assets and liabilities is filed herewith as part hereof marked B.

Defendant denies that the liquidator, the Columbia Finance & Trust Company denied or refused to grant any of the requests of the plaintiffs except the single request for leave to make a minute investigation into the affairs of the Evening Post. To the contrary it is alleged that at the date of the filing of the suit every demand for a statement of assets and liabilities gotten up in precisely the way it was desired by the plaintiffs had been furnished to the plaintiffs, and was in their possession.

Defendants deny that the plaintiffs can obtain information as to the assets and liabilities of the company only by an inspection of the books, and deny that the plaintiffs wish an inspection of the
45 books for the purpose of obtaining a statement or a correct statement of the assets and liabilities. Defendants deny that they or any of them have taken over or converted the assets of the Evening Post Company to their own use or the use of any of them. As to the allegations of plaintiffs touching the value of the assets and liabilities, and to whom the liabilities are due, defendants refers to the statements already filed marked Exhibit B, taken from the books of the defendants by the expert accountant, W. S. Parker. Defendants deny that it is essential to the proper ascertainment of the valid indebtedness of the Evening Post that the plaintiffs should be allowed to look at the book with the view of tracing each debt to its origin. Defendants denies that upon an inspection of the books and papers of the Evening Post Company, or of the original entries and documents concerning said indebtedness a great part or any part of said indebtedness can be proved and shown not to be true or valid obligations or liabilities of the Evening Post Company. Defendants deny that an inspection by the plaintiffs is essential or necessary in order that the affairs of the company may be properly and fairly liquidated. They deny that the necessary information cannot be obtained from a transcript or copy of the books, papers or accounts. Defendants deny that they are the only creditors of the Evening Post Company, and say that the names of the creditors of said Evening Post Company are properly shown in the Exhibit "B" filed with this answer, and they deny that there is any necessity to liquidate this company in court rather than in the way prescribed by a statute, and deny that it is impracticable or impossible to have a fair, just and proper accounting and settlement of the business and affairs of the Evening Post Company in the method prescribed by the statute and in the method authorized and directed by the stockholders, and they deny that there is any necessity whatsoever for the accounts to be liquidated and settled in court.

Paragraph 2.

The defendants say that the plaintiffs purchased or acquired the stock which they claim to hold, not as an investment, but for the fraudulent purpose of getting certain detailed information from the papers and documents of the Evening Post Company which they could use and which they expect to use in the interests of the Courier Journal and Evening Times, which they own and control, and against the interests of the stockholders of the Evening Post Company, and to the great injury of the property, plant, &c.,
46 of the Evening Post Company. The defendants says that the plaintiffs' demand for a statement of assets and liabilities has been conceded to them in exactly the terms which they made it, and that statement enabled the plaintiffs to form a just and correct idea of the value of the assets. But the plaintiffs falsely pretending that

they wanted other information which they did not specify are demanding a right to inspect and look into the intimate affairs of the Evening Post Company, for the purpose of injuring the value of the property of the Evening Post Company and benefiting the Courier Journal Company and the Evening Times which desire to injure the owners of the Evening Post Company, their rival, as much as possible.

Defendants say that for exactly the same reasons the plaintiff without any proper cause therefor, are seeking to have the affairs of the Evening Post Company settled in court, in order that the costs of doing so may be as heavy as possible, and the plaintiffs' claim that it is essential for them personally to go into the intimate affairs of the Evening Post Company is a false and pretended claim, and made for the fraudulent purpose of getting information which they wish to use not for the purpose of conserving their property interest in the Evening Post Company, but for the purpose of destroying and injuring the property in which they have a small interest to the end that it may be of advantage to the much larger interests which they own in the Courier Journal Company and Evening Times.

Defendants therefore object and protest against the settlement of the accounts of the liquidator in this court, and say that there is no just reason for doing so.

Wherefore they pray to be hence dismissed with their costs and for all general and equitable relief.

HELM, BRUCE & HELM,
Att'ys for Def't.

R. W. Knott, being duly sworn, says that the statements contained in the foregoing answer are true.

RICHARD W. KNOTT.

Subscribed and sworn to before me by R. W. Knott this 21st day of May, 1903. My commission expires Jan'y 27, 1906.

ELIZABETH HARRISON,
N. P., Jeff. Co., Ky.

47 Said answer of the Columbia Finance and Trust Company filed herein on the 23rd day of May, 1903, is as follows, to-wit:

Jefferson Circuit Court, Chancery Branch, — Division.

BRUCE HALDEMAN, BENNETT H. YOUNG, and ELIZABETH HALDEMAN, Executors and Executrix under the Will of W. N. Haldeman, Deceased, Plaintiffs,

vs.

THE EVENING POST COMPANY, RICHARD W. KNOTT, J. M. ATHERTON, John R. Knott, Eugene Q. Knott, and Laura G. Boyle, &c., Defendants.

The defendant, The Columbia Finance & Trust Company, for answer to the petition, says that it was appointed liquidator of the

Evening Post Company, by the stockholders of said company held on the 30th of April 1903, as shown by the resolutions, a copy of which is filed with the answer of its co-defendants. On the same day this defendant accepted the trust.

The defendant says that on the 1st day of May the plaintiffs through their attorneys, Messrs. Dodd & Dodd, addressed a letter to this defendant, the original of which is filed herewith as part hereof marked A, in which this defendant was called upon to furnish certain statements. This defendant answered said communication, a copy of which is filed herewith marked B, in which it agreed to furnish the information exactly as desired. On the next day, the 2nd of May, the plaintiffs through their attorneys addressed a communication to this defendant in which they added to their demand as will be shown by the original filed herewith as part hereof marked C. And this defendant responding to said demand, agreed to furnish information exactly as asked, as shown by a copy of their letter filed herewith and made part hereof marked D. After that, to-wit, on May 7, 1903, the plaintiffs again through their attorneys, Messrs. Dodd & Dodd changed and enlarged their request and in addition to the full statement of assets and liabilities, demanded of this defendant that it allow Mr. Bruce Haldemand to inspect and examine into the books of the Evening Post Company, as shown by the original letter marked Exhibit E. And this demand was re-

48 fused by this defendant, as shown by a copy of its letter filed herewith and made a part hereof marked F. Within a day or two after the letter marked F was sent to-wit May 11. 1903, the plaintiffs and their attorneys were furnished with a detailed statement gotten up exactly as they had requested it should be gotten up, and this statement the plaintiffs had in their possession at the time they brought this suit. A copy of the letter enclosing said statement is filed herewith as Ex. G." This defendant further says that in view of the statement made by the plaintiffs at the meeting of the stockholders of the Evening Post Company that said company was losing money, and in view of the statement in the petition that the plaintiffs "are informed and believe that the defendants are still engaged in conducting and operating the business of the said Evening Post Company, and that the same is being operated at a great loss and expense" this defendant in order to protect itself and to protect the interests of all of the stockholders and at the request of ninety-two per cent. of the stockholders, leased the property and assets of the old Evening Post Company, of whose affairs it is the liquidator, to the new Evening Post Company, organized and existing under the laws of this State, with the power to begin business on May 10, 1903, said lease to expire at the date of the sale of the property. The lessee agreed,

1. That it will pay all the expenses and obligations that have been incurred since the 1st day of May, 1903.

2. That it will turn over the property to the purchaser in as good condition as it was on the 1st of May, 1903. The various individual defendants named in the petition have separately and severally

signed an agreement in which they guaranty that the covenants of the Evening Post Company, the lessee shall be fully and completely carried out. Defendant has adopted this method of being sure of conserving the property by protecting it against all loss in the conduct of its business and all depreciation that might occur, if any, in the property or assets between the 1st of May, 1903, and the date of the sale of the property and delivery of possession.

The defendant says it submits itself to the jurisdiction of the court, and will of course promptly obey all orders of the court, but respectfully submits to the court that it will be an unnecessary and burdensome expense to require the settlement of the estate of the Evening Post Company in this court rather than in the manner prescribed by statute.

49 Defendant prays for such orders as may seem to the court meet and just, and for the protection of the assets in this defendant's hands as liquidator, and for its own protection, and for all general and equitable relief.

HELM, BRUCE & HELM.

Attilla Cox says he is the president of the Columbia Finance & Trust Company, and that he believes the statements contained in the foregoing answer are true.

ATTILLA COX.

Subscribed and sworn to before me by Attilla Cox this 20 day of May, 1903. My commission expires Jan. 31, 1906.

E. K. BOSTON,
N. P., Jeff. Co., Ky.

At a court held on the 25th day of May, 1903:

Came parties by counsel and this action having been further heard, it is ordered that said action be and it is postponed to the 30th inst. for further hearing.

At a court held on the 30th day of May, 1903:

Came parties by counsel and came the defendants, The Columbia Finance and Trust Company, liquidator of the Evening Post Company, and tendered and moved the court to file an amended and supplemental answer herein; to which the plaintiffs object.

And it is ordered that this action be and it is submitted on the pending motions and demurrer.

At a court held on the 4th day of June, 1903:

This action having been heard and submitted: First. Upon the motion of the plaintiffs for an order commanding and directing the defendants, and each of them, to allow the plaintiffs, their counsel or accountant reasonable access to an inspection of the books, records and documents of The Evening Post Company, defendants hereto, touching its assets, liabilities and business affairs.

50 Second. Upon demurrer to petition, and third. Upon motion to file an amended and supplemental answer tendered

May 30th 1903, and the court being sufficiently advised delivered an opinion upon the motion for inspection of the books, records and documents touching the assets, liabilities and business affairs of the defendant Evening Post Company, which is ordered to be and is now filed and made a part of the record herein.

Pursuant thereto, it is now ordered and adjudged that the plaintiffs' motion, made herein on the 19th day of May, 1903, be and it is sustained, and it is accordingly ordered and adjudged that the defendants, Evening Post Company, Columbia Finance and Trust Company, as liquidator and trustee of the Evening Post Company, R. W. Knott, J. M. Atherton, John R. Knott Eugene Q. Knott, and Laura G. Boyle, be and each of them their officers, agents, servants and employees, are hereby commanded and directed, until the further order of the court herein, to allow and afford to the plaintiffs, Bruce Haldeman, Bennett H. Young, and Elizabeth Haldeman, or any one of them as executor or executrix of W. N. Haldeman deceased, their attorneys or accountant, during business hours, reasonable access to and an inspection of the books, records and documents of the Evening Post Company, touching its condition and business affairs, and especially touching all of its assets and liabilities, and the considerations paid or received therefor.

The plaintiffs are not to be confined to their own personal examination, but are to have the right to such inspection and examination of the whole or any part thereof, either in person or by an agent, counsel or expert, with the privilege of making such copies or extracts from entries in the said books and accounts as they, or either of them may desire.

It is further ordered and adjudged that the demurrer of the defendants to the petition herein be, and the same is overruled.

It is further ordered and adjudged that the objection to the filing of the amended and supplemental answer of the Columbia Finance and Trust Company, trustee, tendered herein May 30th, 1903, be sustained, and that the motion to file the said amended and supplemental answer be and the same is overruled; to all of the foregoing order and each and every part thereof the defendants except and object, and are given until June 13th, 1903, to prepare and file a bill of exceptions herein.

51 Said opinion filed herein on the 4th day of June, 1903, is as follows, to-wit:

Jefferson Circuit Court, Chancery Branch, First Division.

W. N. HALDEMAN'S EX'ORS, Plaintiffs,
vs.
EVENING POST COMPANY ET AL., Defendants. } Opinion.

At the time of his death in 1902, and for four years prior thereto W. N. Haldeman was the owner of 48 shares of the capital stock of the Evening Post Company of the par value of $4800.00. The

plaintiffs, as his executors, bring this suit for a settlement of the accounts of the Evening Post Company under the following state of affairs. The charter of that corporation expired on May 1st, 1903. At a meeting of the stockholders on April 30th, 1903, a resolution was adopted placing the entire property and assets of the Evening Post Company in the hands of the Columbia Finance & Trust Company, with instructions to advertise and sell the same, pay the debt of the corporation and distribute any surplus among the stockholders. The authorized capital stock of the Evening Post Company is $60,000.00; its liabilities are limited by the charter to $40,000.00; its indebtedness is $109,000.00. Upon the expiration of the old charter on May 1st 1903, a new corporation was formed in which the plaintiffs have no interest. The assets of the old Evening Post Company have been leased to the new company pending the sale by the liquidator. The plaintiffs asked leave to examine the books, papers and affairs of the corporation with the view of verifying the statement of debts against it, but were denied the privilege by the defendant liquidator.

Thereupon the plaintiffs moved the court for a mandatory order commanding and directing the defendants to allow the plaintiffs, their counsel and accountant reasonable access to and inspection of the books, records and documents of the Evening Post Company touching its assets, liabilities and business affairs. The action has been heard and is now submitted upon this motion.

The question for decision is this:—What right has a person to inspect the books, accounts and business affairs of a corporation of which he is part owner, in his capacity of stockholder?

52 The general rule, with the exceptions thereto, is laid down in Clark on Corporations, p. 336, as follows:

"It is well settled in this country that any stockholders or a corporation is entitled to inspect the books and papers of the company for proper purposes and at proper times; and if the right is wrongfully denied him by the corporation or its officers, he may maintain an action for any damages which he may have sustained thereby, or he may enforce his right by petition for a writ of mandamus to compel the corporation or the officers having charge of the books and papers to permit an inspection, or he may sue for the penalty where one is prescribed by statute. The writ may issue against the officer having the custody of the books, on his refusal to allow an inspection, and the corporation is not a necessary party. In the case of a partnership, every partner has an absolute and unrestricted right to examine the books and papers of the firm; but the right of stockholders of a corporation in this respect is not unlimited. By the weight of authority, at common law, the court will not issue a writ of mandamus to compel the corporation to allow an inspection unless the petitioner shows some good reason for making an examination. The writ will not be issued to enable the stockholders to make an examination for the purpose of accomplishing purely personal or speculative ends, nor will it be issued at the caprice of the curious or suspicious; but the petitioner must show a specific and a proper purpose."

The same general doctrine is laid down in Thompson on Corporations, secs. 4406 *et seq.* and in Cook on Corporations, sec. 511 *et seq.*

In Huylar *vs.* Cragin Cattle Co., 40 N. J. Eq., 392, the court said:—

"Stockholders are entitled to inspect the books of the company for proper purposes at proper times * * * and they are entitled to such inspection though their only object is to ascertain whether their affairs have been properly conducted by the directors or managers."

In Commonwealth *v.* Phœnix Iron Co., 105 P. A. St. 111, the court said:—

"The doctrine of the law is that the books and papers of the corporation, though of necessity kept in some one hand, are the common propert- of all the stockholders."

53 The reason for the rule has been stated in Cincinnati Volksblatt Co. *v.* Hoffmeister (Ohio 1900), 56 N. E., 1035 as follows:

"When all has been said it remains that a corporation is not in reality a person or a thing distinct from its constituent parts, and the constituent parts are the stockholders, as much so in essence and in reality as the several partners are the constituent parts of the partnership. Stripped of misleading verbiage the corporation is a device created by law whereby an aggregation of persons who may avail themselves of its privileges by organization are permitted to use their property in a way different from that which is permitted to others who do not so organize, and with certain special advantages, among which are a measure as to personal liability for debts, and the power to perpatrate the organization, denied by the law to all others. With this conception of a corporation, it would seem to follow, as matter of course, that the property of a corporation, although subject under some conditions to rights of creditors, is, in the last analysis, that of the stockholders; and that when one seeks an inspection of its books, records, or property he is in reality but seeking an inspection of his own, and that this should be accorded fully freely and at all times when such inspection will not unreasonable inconvenience others who have like interesy and rights to the property, and that the attempt to unreasonably hamper such inspection by officers, managers, or others is an unjust exercise of powers, and one which courts should not sanction. Nor can the officers of the corporation, or the other stockholders justly complain. They have chosen this method of investing their means and conducting the business for personal profit—a method which as we have seen, is especially favored by the law,—and they should expect to endure such inconveniences, and such chances of exposure of management, as the method entails. In other words, it is not unreasonable that they should be required to take the bitter with the sweet."

If it were necessary to cite any additional authorities in support of this right in the stockholder, they can be found in Weihenmayer *v.* Bitner (1898) (Md.) and *In re* Steinway, 159 N. Y. 250 and in the elaborate and exhaustive note to these two cases in 45 L. R. A., 456–475.

It is objected here, however, that the plaintiffs are the owners of the Courier Journal and Times, newspapers which are rivals and competitors in business with the Evening Post Company as
54 publishers of the Evening Post newspaper, and that the plaintiffs should not for that reason be permitted to see or inspect the books and papers of the Evening Post Company.

The plaintiffs have been furnished with a general statement showing the affairs of the corporation, and defendants deny their right to know any more. The plaintiffs, however, claim that they have the right to verify that statement; to trace the history of the indebtedness charged against them as stockholders, and that they can only obtain such information by an inspection and examination of the books of the corporation. In this connection Col. R. W. Knott testified as follows:

"62. Are not the books open freely to all the stockholders of the Post Company except the Haldeman estate?

A. They are.

63. Now what is it that you don't want the Haldeman estate to see?

A. What the Haldeman estate *wants* to see.

64. What is it then that the Haldeman estate wants to see?

A. I have been unable to find out.

65. Mr. Knott, is there a single thing on your books that you are ashamed to let a stockholder and the Haldeman estate see?

A. Not a thing.

77. Would not the books of the Evening Post Company show the history of how the assets grew?

A. Undoubtedly.

79. Can any one individually know except by looking at the books?

A. There is no other way of knowing.

109. You haven't allowed the Haldeman estate to see any book at all of the Evening Post Company?

A. None at all."

The result of the evidence upon the issue of hostile intent amounts to this: that the plaintiffs as stockholders in an insolvent corporation in liquidation want an inspection of the corporate affairs for purposes of information and to protect their property rights in the winding up process; that they do not, and cannot specify what they want because they have no information that they are willing
55 to rely on, and that they are entitled to the best information obtainable and to get it at first hand; while the defendants do not want plaintiffs to have the information they want, not because of its character or important-, but because the plaintiffs want it possibly, for some ulterior purpose.

In view of this condition of the record, it is only necessary to bear in mind that a stockholder in a corporation has in the very nature of things and upon principles of equity and good faith and fair dealing the right to know how the affairs of the company have been

conducted; whether the capital of which he is part owner has been properly and legally employed; whether the debts against it are proper charges, and to inspect the books of the corporation for the purpose of obtaining such knowledge. State *ex rel.* Martin *v.* Bienville Oil Works Co., 21 La. Ann., 204.

In Northern Pac. R'y Co. *vs.* Keyes, 91 Fed., 59, the court said:

"A reasonable safeguard against falsification in the preparation of such statements is furnished by placing the records from which they are compiled free at the disposal of the asverse party. It was the duty of the companies to do this, and to give the attorney general the fullest assistance in explaining such records, and to allow him to place the same in the hands of expert accountants, if he so desired, for the purpose of detecting error or falsification in the tertimony as prepared by the companies.

Upon the issue of good faith on the part of plaintiffs a mere recital of the facts abundantly show- that they have acted with the utmost good faith and with all the forbearance that their position as trustees for others would justify. W. N. Haldeman has owned this stock since 1898; has received no dividends thereon; the corporation has expired by limitation and has gone into liquidation; has a capital stock of $60,000.00 and an indebtedness of $109,000.00; has placed its assets in the hands of the trustee for sale, and that trustee has leased the entire assets of every kind and character to be used in the business of another corporation. Under these circumstances it was not only the right but it was the duty of these plaintiffs to protect their trust in every way and by every means known to the law; and if in their opinion the method chosen by this suit and motion was the only adequate or most available remedy open to them they were justified in pursuing it. The burden of
56 proving that a stockholder's request for inspection of the books of the corporation is not made in good faith or is not made for the interests of the corporation, is upon the corporation when it refuses the request upon that ground. State *ex rel.* Weinberg *v.* Pacific Brewing & M. Co., 47 L. R. A., 209. The law imposes the duty of acting upon the executors whenever, in the exercise of sound judgment, action should be taken for the protection and preservation of the estate committed to their care. This action to settle this trust is not unusual or extraordinary in any respect; on the contrary, it is the usual every day remedy applied by the courts in cases of this general character. Should this ancillary remedy afforded by an inspection of the books and papers be allowed? Does this case come within the general rule allowing the inspection, or within some one of the exceptions to the rule? The petition says:

"They (the plaintiffs) are informed, advised and charged that the individual defendants have taken over and concerted to their own use, and are now using in violation of plaintiffs' rights, all of the assets of the Evening Post Company, including its good-will, etc., and to that end have converted to their own use the entire assets of every kind and description, including the good-will and name of the said Evening Post Company, to the exclusion of the plaintiffs.

They state that in law and in equity, and good conscience they are entitled to an inspection of the books and affairs of the said Evening Post Company; that they repeatedly presented themselves and demanded the right to a full inspection and examination of the books and affairs of the said Evening Post Company and have been uniformly denied, any inspection whatever, or any investigation whatever, and have been refused any and all information pertaining thereto."

In State *ex rel.* Weinberg *v.* Pacific Brewing & Malting Co., (Wash. 1899) 47 L. R. A., 208, 213, the court said:—

"The injustice of the rule, when applied in all its strictness, has been so keenly felt that in England, and in many of the United States, the right of inspection of corporation books is now guaranteed to the stockholders by statute, and such statutes seem to be generally held not to be innovations in, but declaratory of, the common law. The tendency of the modern decisions, also is towards holding that a stockholder, as such, has a right to inspect
57 the books and other documents of the corporation, where his sole object is to inform himself as to the manner in which the business of the corporation is being conducted. In State *ex rel.* Doyle *v.* Laughlin, 53 Mo. App. 542, the facts were that the relator was a stockholder in a banking corporation, and as such stockholder requested of the directors and officers of the bank the privilege of examining the books of the bank for the sole purpose of acquainting himself with the condition of its affairs and how the bank was being managed. On the request being refused, he brought mandamus to compel the officers to allow such inspection. The court said: 'The right of the stockholder to examine and inspect all the books and records of a corporation at all seasonable times, and to be thereby informed of the condition of the corporation and its property, is a common law right. It is quite obvious, therefore that the relator has a clear right to examine the books of the bank in question; and though the relator in his application for the alternative writ took the precaution to state the purpose for which he sought to exercise the right of inspection, this upon principle, we think was unnecessary. If the right of inspection of the corporate books exists, whether under the statute or at common law, the purpose of the exercise of the right is immaterial. State *ex rel.* Spinney *v.* Sportsman's Park & Club Asso., 29 Mo. 326. Because the right may be made the subject of abuse does not prove that it does not exist. The manner in which it may be exercised might well be regulated by the by-laws of the corporation. Such regulations, would, of course, have to be reasonable. The right could not be regulated out of existence.' In State *ex rel.* Bourdette *v.* New Orleans Gaslight Co., 49 La. Ann. 1556, 22 So. 815, the court said: "No better was of safeguarding the interest of the public can, perhaps, be devised, or one that may be so easily and readily applied as the right to the frequent, sudden and speedy examination of the books of corporations in the stock or shares of which investors and speculators are invited to trade. The recognition of this fact attests alike the wisdom and purpose of the framers of the

Constitution. The question here presented was virtually passed upon in Legendre *v.* New Orleans Brewing Asso. 45 La. Ann. 669, 12 So. 837, and adversely to the pretensions of defendant's corporation herein. See also State *ex rel.* Martin *v.* Bienbille Oil Works Co., 28 La. Ann. 204; Cockburn *vs.* Union Bank, 13 La. Ann. 289. In the United States, the prevailing doctrine
appears to be that the individual shareholders in a corpora-
58 tion have the same right as the members of an ordinary
partnership to examine their company's books, although they have no power to interfere with the management. Morawetz Priv. Corp. sec. 473. This doctrine obtains with all the more force in this State, by reason of its recognition in the constitution itself.' In Lewis *v.* Brainerd, 53 Vt. 519, an action brought under a statute to recover a penalty fixed by the statute for refusing to permit a stockholder to examine the books, the court, on affirming a judgment recovered for such refusal, said: 'The stockholders in a corporation hold the franchise, and are the owners of the corporate property; and as such owners they have the right, at common law, to examine and inspect the books and records of the corporation, at all seasonable times, and to be thereby informed of the condition of the corporation and its property."

The plaintiffs' position in this case is well stated in the following language of the court's opinion in Huyler *v.* Cragin Cattle Co., 40 N. J., Eq., 392:

"Stockholders are entitled to inspect the books of the company for proper purposes at proper times * * * And they are entitled to such inspection, though their only object is to ascertain whether their affairs have been properly conducted by the directors or managers. Such a right is necessary to their protection to say that they have the right, but that it can be enforced only when they have ascertained in some way without the books, that their affairs have been mismanaged, or that their interests are in danger, is practically to deny the right in the majority of cases. Oftentimes frauds are discoverable only by examination of the books by an expert accountant. The books are not the private property of the directors of managers, but are the records of their transactions as trustees for the stockholders."

In Thompson on Corporations, (sec. 4418), the author quotes from the English cases laying down the rule that the right of inspection will not be enforced unless there is a defined distinct dispute, and adds:

"It should be carefully added, however, that this theory has gained no considerable footing in America, nor is it based upon any foundation of sense. Subject to the convenience of the others, or of the common agency which acts for all, it is the right of every proprietor to know how the business in which he has embarked
59 his money is being carried on, whether there is any dispute about it or not."

After citing these authorities the opinion in State *ex rel.* Weinberg *vs.* Pacific B. & M. Co. *supra* closes as follows:

"Corporations, owing to the ease with which they can be formed, under the liberal provisions of the statute, and affording as they do, a limited liability for investors, have become a favorite means for the combination of capital, and are now engaged in almost every variety and character of business. In fact, they have largely superseded partnerships. Not having behind them the personal responsibility and fortunes of the promoters, or that of those who may have invested in their capital stock, the interests of the public at large require, and especially that part of the public dealing with them, that the courts adopt the rule which will most larg-ly conduce to honesty in their management. We believe that these interests will be better protected by the holding that a stockholder of a corporation has the right, at reasonable times, to inspect and examine the books and records of such corporations so long as his purpose is to inform himself as to the manner and fidelity with which the corporate affairs are being conducted and his examination is made in the interests of the corporation. Nor will it be presumed, when such request is made, that the purpose of the inspection is other than in the interest of the corporation, and, when it is charged to be otherwise, the burden should be on the officers refusing such request or the corporation to establish it. The argument that, under this rule, the managers of a rival concern may acquire stock in the corporation, and use the privilege for the purposes of benefitting the rival concern, to the detriment of the corporation, is not more forceful than the other, that, under the restricted rule, a combination can be made by persons holding the majority of the stock by which the corporation is managed for their own interests, to the exclusion and detriment of the minority holders an- injury to the public dealing with it."

Moreover, so much of the rule as gives consideration to the element of intent, even though it be hostile, has no application in this case and no bearing upon this motion.

This defendant is not a going concern; it has no business prospects to be affected by a hostile purpose. The rule restricting the right of inspection of books and papers is from the very reason of it, applicable to going concerns only. When the corporation has
60 expired and its assets are in the hands of a trustee for distribution, it no longer bears the character of a corporation as between the stockholders but it has all the elements and characteristics of a mere co-partnership, the books of which, by well established law, are always open to the inspection of members. (Cook on Corp., sec. 511; Clark on Corp. sec. 134.)

In the case of a partnership this right to examine the books is absolute and unrestricted. Neither can the right of inspection be defeated by an offer to buy the shares of the complaining stockholder.

In State v. St. Louis R. R. Co., 29 Mo. App., 301, the court said:

"The relator is not bound either to forfeit his legal rights or to sell his shares to the corporation at their market value. The courts of justice are not going to assist corporations thus to exercise the right

of eminent domain over the shares of their own stockholders, to enable such corporations to avoid doing to their stockholders the simple justice which the statute enjoins."

The case of Stettauer *v.* N. Y., &c., Construction Co., 42 N. J. Eq. 46; 6 Atl. Rep., 303, is not at variance with the foregoing authorities for in that case, the stockholder by his suit sought merely to exercise the right of inspection, with the view of bringing a suit in equity in case he should find out that he had been defrauded, and the court held that he has a complete remedy at law, for all the relief he was then asking, to wit, an inspection of the books. In the case at bar, however, we have a suit in equity over the settlement of an estate held in trust, and the inspection of the books is asked only as relief ancillary to that cause of action.

Whether we view the case, therefore, as a corporation, or as a partnership by reason of its expiration and cessation of business, the plaintiffs are entitled to the relief asked, and the motion will be sustained.

SHACKELFORD MILLER, *Judge.*

June 4th, 1903.

61 At a court held on the 13th day of June, 1903:

Came plaintiffs by counsel and filed written notice and the affidavit of Bruce Haldeman herein.

And thereupon plaintiffs moved the court to file a reply herein. And plaintiffs further moved the court to appoint a receiver herein to take charge of, collect in, manage, execute and wind up the trust estate described in the petition herein under appropriate instructions of court.

And plaintiffs further tendered an order and moved the court to refer this action to the commissioner of this court; to all of which motions the defendants object.

And it is ordered that this action be and it is assigned to the 16th day of June, 1903, for hearing on said motions.

And on motion of the defendants, by counsel, it is ordered that the time for filing a bill of exceptions be and it is extended to the 16th inst. herein.

At a court held on the 16th day of June, 1903:

Came the defendants by counsel and tendered and moved the court to sign their bill of exceptions and transcript of testimony, and the same being examined, approved and signed by the judge it is ordered to be and is now filed and made part of the record herein.

At a court held on the 18th day of June, 1903:

Came the defendants by counsel and entered formal objections upon the record to the motion of the plaintiffs to refer this cause to the commissioner of this court to audit, state and settle the affairs and accounts of the Evening Post Company and its liquidator accordingly as prayed in their petition herein.

And defendants object to the further motion to "appoint a receiver

to take charge of and collect in, manage, execute and wind up under the instructions of the court the trust estate described in the petition herein." And defendants filed written grounds in support of said motions.

On motion of plaintiffs by counsel it is ordered that the motion to file their reply tendered on the 13th inst., be and it is sustained, and it is ordered that said reply be and is now filed.

And this action having been heard it is ordered that said
62 action be and is submitted on pending motions.

Said written grounds filed herein on the 18th day of June, 1903, is as follows, to wit:

Jefferson Circuit Court, Chancery Branch, First Division.

W. N. HALDEMAN'S EXECUTORS, Plaintiffs,
vs.
EVENING POST COMPANY, ETC., Defendants.

Now come the defendants and enter formal objections upon the record to the motion of the plaintiffs to refer this cause to its commissioner to "audit, state and settle the affairs and accounts of the Evening Post Company and its liquidator and trustee accordingly as prayed in their petition herein" upon the ground that in a suit recently instituted by Stuart R. Knott in behalf of himself and other creditors against the Evening Post Company in the circuit court of the United States for the western district of Kentucky it is therein sought to have all the accounts and estate of the Evening Post Company settled, adjusted, sold and distributed among those entitled thereto, and they object to the further motion to "appoint a receiver to take charge of and collect in, manage, execute and wind up under the instructions of the court the trust estate described in the petition herein" for the reason that in the case in the circuit court of the United States above described the court has already appointed a receiver, to-wit, Lewis Humphrey, and has directed him to take charge, and he has taken charge of all the assets of every character belonging to the Evening Post Company including its books, records, accounts and papers of all kinds, and said Lewis Humphrey has now possession of said assets, books, papers, etc., under the order of said circuit court of the United States for the western district of Kentucky, with directions that he shall hold the same subject only to the orders of that court.

HELM, BRUCE & HELM,
Attorneys for the Defendant.

63 Said reply filed herein on the 18th day of June, 1903, is as follows, to-wit:

Jefferson Circuit Court, Chancery Branch, First Division.

W. N. HALDEMAN'S EXECUTORS ET AL., Plaintiffs,
vs.
EVENING POST COMPANY ET AL., Defendants.
} Reply of Plaintiffs.

For reply to the answers of the defendants herein, on the information and belief, plaintiffs deny that they defendants have operated the property for its best interest, or otherwise than as if it was their individual property, as set forth in the original petition.

They deny that the 48 *acres* of stock in controversy *was* not acquired by their testator, the late W. N. Haldeman, in 1898, or that the said W. N. Haldeman ever caused the certificate of the saie shares to be placed in the name of one James Gaines, a negro, or had anything to do with the placing of the same.

They say that the resolutions of the stockholders at the meeting held at 3 o'clock p. m. on April 30th, 1903, and the proceedings of said meeting were all in writing, as exhibited with the petition, and speak for themselves, and here refer to the same as the best evidence of what occurred at that meeting. They deny that anything occurred at said meeting except as set forth in the said exhibit.

They deny that the liquidator, Columbia Finance and Trust Company, or any other person ever prepared or furnished any information to plaintiffs touching the matters set forth in their petition until after the preparation and completion thereof as filed.

They have no knowledge or information sufficient to form a belief as to whether the statement of assets and liabilities exhibited with the answer herein is a true and correct statement of the assets and liabilities, and, therefore, deny that it is such statement.

They deny that at the time of the filing of this suit or at any time, the defendants, or any of them have ever complied with the demands of the plaintiffs, or gotten up or furnished a statement of assets and liabilities in precisely the way, or otherwise, as it was desired by the plaintiffs, or that the same was furnished to the
64 plaintiffs, or was in their possession before the preparation and completion of the petition herein.

They deny that plaintiffs' testator, or the plaintiffs purchased or acquired the stock which they hold, not as an investment, but for the frauduient purpose of getting certain detailed information from the papers and documents of the Evening Post Company. They deny that either the plaintiffs or their testator ever acquired or ever held the said stock for any fraudulent purpose, or for any other purpose than in good faith.

They deny that the said stock was acquired for the purpose of acquiring information which they could either use, or expected to use in the interest of the Courier-Journal and Evening Times, or either, or against the interest of the stockholders of the Evening

Post Company, or to the great or any injury to the property, plant, etc., of the Evening Post Company.

They deny that their demands have been conceded in the terms made by them, or otherwise, or that the statement claimed to have been furnished by the defendants was sufficient to enable the plaintiffs to form either a just or correct idea of the value of the assets of the Evening Post Company. They deny that any person could furnish either a just or correct idea of the value of the said assets, nor of the amount of the said liabilitie- without an inspection and examination of the books, records and documents of the said Evening Post Company.

They deny that they ever falsely or otherwise, pretended that they wanted other information which they did not specify, either for the purpose of injuring the value of the property of the Evening Post Company, or for the purpose of benefitting the Courier-Journal or Evening Times.

They deny that they or either of them, ever desired to injure the owners of the Evening Post Company as a rival as much as possible, or in any respect whatever.

They deny that without any proper cause therefor they are seeking to have the affairs of the Evening Post Company settled in court that the cost of doing so may be as heavy as possible, or for any other reason than to have a fair and equitable settlement of the said affairs.

They deny that their demands to be put in the same position as the other stockholders with reference to knowledge of the books, records, documents and intimate affairs of the Evening Post Company is either a false or pretended claim, or was or is made
65 either for the fraudulent purpose of getting information which they wish to use *not* for the purpose of conserving their property interest in the Evening Post Company, or for any other proper purpose.

They deny that their said demand and claim is for the purpose of destroying or injuring the property in which they hold 48 shares to the end that it may be of advantage to the much large- interest which they own in the Courier-Journal Company or in the Evening Times Company, or that it is for any illegal or improper purpose.

They deny that there is no just reason for their demands herein made, or for a settlement of the affairs of the Evening Post Company in this suit and in this court.

Paragraph 2. And for reply to the answer of the Columbia Finance and Trust Company, the plaintiffs deny that at any time prior to the preparation and completion of the original petition herein, ir, or any of the defendants, ever furnished them with any information demanded of them.

They deny that before the preparation or completion of the petition herein, or any of them *or* their attorneys, or any of them, were furnished with a detailed statement either gotten up exactly as they requested it should be gotten up, or complied with the plaintiffs' demands, or that the plaintiffs had in their possession at the time of

the completion of the petition herein and statement whatever from the defendants.

They deny that in view of any statement made by the plaintiffs, or any of them at the meeting of the stockholders of the Evening Post Company on April 30th, 1903, or in view of any statement in the petition the said Columbia Finance and Trust Company, as trustee and liquidator, did, in order to protect itself or in order to protect the interest of *all* of the stockholders, or at the request of 92 per cent. of the said stockholders, lease the property of the Evening Post Company, of whose affairs it is liquidator, to the Evening Post Company, organized by the defendants to succeed the said Evening Post Company; and they deny that the said liquidator ever had any power or authority to make any such lease, or that any such lease was ever submitted to them, or either of them, or that they were ever advised thereof until they read the contents of the said answer herein. They deny that the said alleged lease is valid or binding upon them, or either of them. They deny
66 that the said alleged *leases* have any right or authority to use the name of the Evening Post Company in any such alleged reorganization or lease without their consent or authority, and deny that the- ever obtained their consent or authority to so use the same.

They deny that it would be either an unnecessary or a burdensome expense to require the settlement of the estate of the Evening Post Company to be made herein accordingly as prayed in their petition, and they deny that the defendants are proceeding to settle the same in the manner or form as prescribed by the statute, or in any manner or form as prescribed by the statute, or in any manner or form to which these plaintiffs or either of them, were parties, or about which they have either been consulted or considered.

Paragraph 3. And for further reply these plaintiffs say that they have no knowledge or information sufficient to form a belief as to whether the defendant, The Evening Post Company, owes bills payable aggregating $89,069.85, or any part thereof, nor whether it owes accounts payable aggregating $21,557.70, or any part thereof. Without an inspection, examination and tracing of the said items from the books of the said Evening Post Company, and until they can have such examination and inspection the plaintiff- deny the said Evening Post Company owes the same or any part thereof. Touching the alleged resources or assets of the said Evening Post Company plaintiffs have no knowledge or information sufficient to form a belief, and until they are allowed the right, as part owners thereof, to inspect and examine the books of the said Evening Post Company they deny that they are correctly set forth in the exhibits attached to and made a part of the defendants' answers herein.

They deny that the said exhibits furnish the necessary information or that they are the primary or best evidence of the matters therein set forth. They deny that the said exhibits have been very accurately and correctly prepared, or that they discover the real or

true financial condition of the affairs of the said Evening Post Company.

Wherefore having fully replied they pray as they have already prayed and for all proper relief.

DODD & DODD,
KOHN, BAIRD & SPINDLE,
Attorneys for the Plaintiffs.

67 Bruce Haldeman says that the foregoing reply is true as he verily believes.

BRUCE HALDEMAN.

Subscribed and sworn to before me by Bruce Haldeman this the 13th day of June, 1903. My commission expires at the end of the next session of the senate.

ELENOR SHORT,
N. P., J. C., Ky.

At a court held on the 27th day of June, 1903:

The court being now sufficiently advised, on pending motions delivered a written opinion, which is ordered to be and is now filed and made a part of the record herein.

Pursuant thereto it is now considered, ordered and adjudged as follows:

1. That the motion of plaintiffs to appoint a receiver to take charge of, collect in, manage, execute and wind up the trust estate described in the petition under the direction of this court be and it is sustained, and it is now ordered and adjudged that the Louisville Trust Company of Louisville Kentucky be and it is hereby appointed such receiver herein. Before entering upon its duties as such receiver it shall, through its duly authorized, executive officers, be sworn to faithfully perform the duties of receiver and shall also execute a bond to the Commonwealth of Kentucky for the use and benefit of the persons interested in the said trust estate for the sum of $40,000.00, with its capital stock as surety, to be approved by this court or the judge thereof, to the effect that it will faithfully discharge the duties of such receiver and obey the orders of this court herein. Upon its qualification as receiver as aforesaid it shall claim and take possession and charge of the said trust estate, and the defendants The Evening Post Company, Columbia Finance and Trust Company, liquidator, or trustee of the Evening Post Company, Richard W. Knott, J. M. Atherton, John R. Knott, Eugene Q. Knott, and Laura G. Boyle as well as each of their agents, servants and employees, are hereby ordered and directed to deliver — the said Louisville Trust Company, as such receiver, possession of all the property of the said Evening Post Company, of every kind, character or description, together with all of the books, papers and documents of the said Evening Post Company pertaining to its affairs,
68 business and accounts, both as to its assets and liabilities from May 1st, 1878, to the present time. The said receiver

is directed to take an inventory of all of the assets and property so turned over to and received by it and to report the same to this court as soon after its completion as practicable, *which said* recommendation touching their present condition and such manner of sale to be made thereof as in its judgment will yield the largest price therefor. The said receiver is directed to report its acts and doings to the court from time to time.

2. That the motion of the plaintiff to refer this cause to the commissioner of this court with instructions to advertise for and take proof of claims existing against the Evening Post Company which were incurred prior to May 1st, 1903, and to audit, state and report to this court the assets and liabilities of said Evening Post Company and liens or priorities if any, any of the creditors are entitled to, and also to audit, state and settle the accounts of the Evening Post Company and of the Columbia Finance and Trust Company as liquidator and trustee, accordingly as prayed in the petition, be, and it is hereby sustained, and it is now ordered that this cause be, and it is now referred to the commissioner of this court with the following directions, to-wit:

a. To cause a notice to be published for at least once a week for four consecutive weeks in the Louisville Times, a daily newspaper, printed and published in the city of Louisville, and county of Jefferson, of the fact that the affairs and business of the Evening Post Company are being closed and wound up and that all persons holding claims against the said Evening Post Company, which were incurred prior to May 1, 1901, should present and file the same before the said commissioner proven as required by law, on or before September 1st, 1903.

b. To ascertain state and report to the court the assets and the liabilities of the said Evening Post Company, and what liens or priorities *m* if any, any of the creditors are entitled to.

c. To audit, state and settle the account of the Columbia Finance and Trust Company as liquidator and trustee of the said Evening Post Company *as liquidator and trustee of the said Evening Post Company*, and the said commissioner is directed to make his report to the court herein on or before October 3rd, 1903.

To all of the foregoing orders, the defendants, and each of them, object and except.

69 Said opinion filed herein on the 27th day of June, 1903, is as follows, to-wit:

Jefferson Circuit Court, Chancery Branch, First Division.

HALDEMAN'S EXECUTORS, Plaintiffs,
vs.
EVENING POST COMPANY, Defendant. } Opinion.

This action is submitted upon plaintiffs' motions of June 13th, 1903:

1. To appoint a receiver to take charge of, collect in, manage, ex-

ecute and wind up, under the instructions of the court, the estate of the Evening Post Company, held in trust for the benefit of its creditors; and

2. To refer this cause to the commissioner to audit, state an- settle the affairs of the Evening Post Company and its liquidator and trustee.

On June 4th, 1903, an order was entered requiring the defendants, including the liquidator and trustee, the Columbia Finance and Trust Company, to permit and allow the plaintiffs access to and an inspectio- of the books, records and documents of the Evening Post Company, which are in the hands of the liquidator and trustee for the benefit of creditors.

The liquidator and trustee has declined to comply with this order, because the United States circuit court has, in the case of S. R. Knott *vs.* The Evening Post Company, brought in that court—since this action was instituted, appointed a receiver for the Evening Post Company, who has taken possession of the books and papers of that corporation.

The defendants insist that the subsequent appointment of the receiver by the Federal court ousts this court of its formerly acquired jurisdiction over this trust estate. This was the only question argued upon this hearing.

In its original answer herein the liquidator and trustee said:

"The defendant (liquidator and trustee) says it submits itself to the jurisdiction of the court, and will of course promptly obey all orders of the court."

70 If the subsequent proceedings of the Federal court are sufficient to take the corpus of this trust estate out of the control of this jurisdiction, the response of the liquidator is sufficient; but if those subsequent proceedings in the Federal court did not deprive this court of its jurisdiction thereto acquired, the response of the liquidator is evidently insufficient.

The petition shows that the gist of this action is to settle and wind up the affairs of the Evening Post Company under the trusts created by the liquidating resolution of April 20, 1903 (pet. pp. 3 and 5), in connection with section 561 Kentucky Statutes. The first clause of this trust instrument recites "it has become necessary to have all the assets of every character of the (Post) Company sold for the purpose of paying its debts and distributing the surplus, if any, among the stockholders," and further provided that the Columbia Finance & Trust Company be appointed and act as liquidator and trustee for that purpose. Very detailed and specific instructions are then given to said trustee. The sixth clause then provides as follows:

"The said liquidator shall from the proceeds of the sale of the property pay all debts of the corporation and the balance, if any, shall be distributed among the stockholders according to their legal rights."

The plaintiffs are stockholders, and, therefore, interested in the proper administration of this truct. After setting out at length the

condition of the truste estate, and making every body interested therein, whether creditors or stockholders, so far as known to them, parties defendant, and the imperative necessity for judicial intervention and control of the trust, the prayer reads as follows:

"Wherefore, the premises considered the plaintiffs pray for a settlement of the accounts of the Evening Post Company, and of the Columbia Finance and Trust Company as liquidator thereof herein, and that this cause be referred to the commissioner of this court to audit, state and settle the accounts of the Columbia Finance & Trust Company, as trustee or liquidator of the affairs and business of the said Evening Post Company, and *of* the liabilities against the same, be ascertained and reported, and the as-ets sold and disposed of and distributed amongst the parties thereto according to their respective interests.

71 Plaintiffs further pray that pending this action, and until the final liquidation of the affairs of the Evening Post Company and the sale of its plant and assets, that the court herein determine as to whether or not the affairs of the said Evening Post Company should be continued in operation, and, if so, that the operation of the said plant be conducted under and subject to the orders of the court herein.

And the plaintiffs further pray that a mandatory preliminary order be entered herein commanding and directing the defendants, and each of them, to allow the plaintiffs reasonable access to and an examination of the books, papers, documents and affairs of the said Evening Post Company, including all documentary information in connection therewith which is in the possession of the defendants, or any of them.

And the plaintiffs further pray for their costs herein expended, and for all such proper and equitable relief as the nature of the case may demand."

This suit was filed May 12, 1903, and summons was at once issued and served on all of the defendants. May 19th the plaintiffs entered their ancillary motion for leave to inspect the books of the Post Company to enable them to properly prepare their cause for trial. May 23 the defendants all answered, and expressly submitted to the jurisdiction of this court and expressed a willingness to obey its orders herein.

This court devoted May 23 and May 25th to the hearing of that motion, and after 4 p. m. on the latter date, at the instance of counsel for defendants, and upon the express assertion that they could not conclude their evidence on that day, postponed the further hearing until May 30. On the last named appearance the said counsel appeared, tendered the amended answer of the trust company and then left the court room.

It appears on the next day a common law action was instituted in the Federal court, and defendant at once confessed judgment and had an execution issued and immediately returned no property found; that on the next day there was filed in the same court a bill in equity, seeking the same relief herein sought, and defendants at

once entered their appearance and consented to the appointment of an employé of the Post Company as receiver.

All of this was done without notice to plaintiffs or the public, and defendants now claim that the effect of that procedure is
72 to oust this court of jurisdiction, which claim the plaintiffs vigorously dispute.

A few quotations from well known decisions of the highest authority would seem to be sufficient to dispose of this contention.

In Peck *v.* Jennes, 7 How., 624–5, the Supreme Court stated the rule as follows:—

"It is a doctrine of law too long established to require a citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation not merely in comity, but of necessity. For, if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other."

In Farmers' Loan Co. *v.* Lake St. R. R. Co. 177 U. S., 61, the Supreme Court said:—

"The possession of the *res* vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of coordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons.

Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits were brought to enforce liens against specific property, to marshal assets, administer trusts and liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected, the rule has been declared to be of especial importance in its application to Federal and State courts. Peck *v.* Jennes, 7 How., 612; Freeman *v.* Howe, 24 How. 450; Moran *v.* Sturges, 154 U. S. 256; Central Bank *v.* Stevens, 169 U. S., 432; Harkrader *v.* Wadley, 172 U. S. 148."

In Orton *v.* Smith, 18 How., 266, the court said:

73 "Where the jurisdiction of a court and the right of a plaintiff to prosecute his suit in it have once attached, that right cannot be arrested or taken away by proceedings in another court. This rule has its foundation not merely in comity, but in necessity. If one may enjoin, the other may retort by injunction and thus the parties may be without remedy."

In Taylor *v.* Carryl, 20 How., 596o7, after reviewing the authorities, the court said:

"When a court has jurisdiction, it has a right to decide every question which occurs in the cause; and when the jurisdiction of the court and the right of the plaintiff to prosecute his suit has on-e attached, that right cannot be arrested or taken away by proceedings in another suit. Neither can take property from the custody of the other by replevin, or any other process, for this would produce a conflict extremely amb-r-assing to the administration of justice. It forms a recognized portion of the duty of this court to give preference to such principles and modes of procedure as shall serve to conciliate the distinct and independent tribunals of the States and of the Union, so that they may cooperate as harmonious members of a judicial system so extensive with the United States, and submitting to the paramount authority of the same constitution, laws and Federal obligations. The decisions of this court that disclose such an aim, and that embody the principles and modes of administration to accomplish it, have gone from the courts with authority, and have returned to it, bringing the vigor and strength that it always imparted to magistrates of whatever class, by the approbation and confidence of those submitted to their government."

See Howlee *v.* Land Co., 56 Fed. Rep. 162.

In Owens *v.* R. R. Co., 20 Fed., Rep. 10, the court said:

"The jurisdiction of a court attaches upon the service of process, and the court whose process is first served upon the defendant will retain the cause.

The court first gaining jurisdiction of a part of a trust estate is entitled to administer the whole, even though some portion of the property lies within the domain of another court."

In Union Life Insurance Company *v.* University, 6 Fed. Rep. 443 the court said:—

74 "Where two suits involving to a great extent the same subject matter are brought respectively in a State and Federal court, that court whose process is first serviced obtains jurisdiction of all questions which legitimately flow out of the subject matter of the cause."

See also Covell *v.* Heyman, 111 U. S. 182-3.

In Shaw *v.* Lyman, 79 Fed. Rep. 3, the court held that while the pendency in the State court of a suit between the parties on the same cause of action, is no bar to a suit in the Federal court to fix the personal liability of the said parties, still it is a complete bar where the State court case necessarily involves the taking possession of the *res* or subject matter of the suit; that where the subject matter of the suit is *in rem* the court which has first taken possession, or acquired jurisdiction of the *res* is entitled to exclusive jurisdiction, and other courts will not interfere.

In Merritt *v.* American Steel Co., 79 Fed. Rep. 231, the circuit court of appeals for the eighth circuit laid down the rule as follows:

"The doctrine is well settled that when a court, in the progress of a suit properly pending before it, takes possession of property, or where the suit is brought to enforce liens against specific property, to marshall assets, *administer trusts, or liquidate insolvent estates*, and in all other suits of a similar nature the jurisdictio- acquired in the first suit is exclusive, and no other court can lawfully interfere with the possession or *jurisdiction* so acquired. The tribunal which first acquires jurisdiction of a case by the issuance and service or process is entitled to retain it to the end, without interference or hindrance on the part of any other court. This rule in its application to Federal and State courts being the outgrowth of necessity, is the principle of right and law, which leaves nothing to the discretion of the court and may be availed to suit the convenience of litigants."

In Rogers *v.* Pitt, 96 Fed. Rep. 677; Hale *v.* Bugg, 82 Fed. Rep. 36, and Phelps *v.* Mutual Reserve Fund Association, 112 Fed. Rep. 453, the same rule or principle is announced and applied.

In the case of Tefft *v.* Sternberg, 40 Fed. Rep. page 6, Judge Speer, after reviewing the authorities, says:—

75 "These citations of elevated and paramount authority are, perhaps, more copious than is requisite, but since nothing would so seriously prejudice the character and usefulness of the courts of the United States or of the State as those unseemly conflicts of authority, which not only excite communities, but which, both in this country and in England, have afforded occasions for intemperateness in the assertion of jurisdiction on the one hand, and for its denial on the other, hardly comporting with the serene and impartial reserve of the bench, the settled rule upon the subject whenever its announcement is appropriate, cannot be too strongly emphasized or too amply supported by those impregnable statements of principles which stand out in the decisions of the Supreme Court of the United States,—statements which bear in lucid phrase the precise expression of sovereign and beneficent law. Moreover, the apparent conflicts of authority between the courts of the State and of the United States furnish no proper occasion for nice or narrow divisions of the subject of litigation,—none for division of jurisdiction. In a case like that before the court, the court first taking jurisdiction of the substance of the litigation should dispose of all the incidents."

The very recent Supreme Court cases of Mutual Reserve Fund Association *v.* Phelps, and *In re* Watts and Sachs illustrate and apply this indispensible rule in our union of indestructible States.

It seems plain to me from this abundant and explicit authority that the subsequent proceedings in the Federal court did not deprive this court of its jurisdiction theretofore acquired; and the trustee having refused to obey the order of court, it necessarily follows that the court can only proceed through the agency of a receiver.

The motions will be sustained and the Louisville Trust Company will be named as receiver.

SHACKELFORD MILLER, Judge.

June 27th, 1903.

76 At a court held on the 30th day of June, 1903:

This day came the Louisville Trust Company, heretofore appointed receiver herein by H. V. Loving, its president, and offered its bond with its capital stock as surety in the sum of $40,000.00, condition- as required by law, and as provided in the order of its appointment herein, which, being examined by the court, it approved, and thereupon the said Louisville Trust Company qualified as receiver by taking the oath of office as provided in the said order of appointment, and as required by law.

It now appearing to the court that more than two weeks subsequent to the institution of this suit to settle the trust estate of the Evening Post Company therein described and after all the defendants had answered expressly submitting themselves to the jurisdiction of this court, certain proceedings were instituted in the United States circuit court for the western district of Kentucky against the said Evening Post Company, *et al.*, for the settlement of the same trust estate herein involved, which were instituted in the name of Stuart R. Knott, against the said Evening Post Company and others, wherein the proceedings in this action were ignored, and wherein, without notice to plaintiffs, a receiver was appointed to take charge of the same trust estate herein involved, and this court being of the opinion that its jurisdiction to administer, settle and liquidate the said truste estate first attached, and that to enable it to grant the release sought by plaintiff herein, it is necessary to assume the possession and control of all of the property belonging to the said Evening Post Company described in the petition, therefore, in conformity with that spirit of comity which exists between State and Federal courts of concurrent jurisdiction, and in order that there may be no unseemly conflict, it is now ordered that the said Louisville Trust Company, receiver of the said Evening Post Company and its property under the order of appointment in this case to intervene in said case of Stuart R. Knott *versus* Evening Post Company, *et al.*, pending in the said Federal court, and there claim the said trust estate for administration and settlement in this suit, and test and contest the question of the prior jurisdiction of this court over the subject matter in such manner and form as it may be advised by its counsel.

77 Said bond filed herein on the 30th day of June, 1903, is as follows, to-wit:

Bond.

THE COMMONWEALTH OF KENTUCKY,
Jefferson County.

Jefferson Circuit Court, Chancery Branch, First Division.

W. N. HALDEMAN'S EX'OR, ETC., Plaintiff,
versus
EVENING POST COMPANY ET AL., Defendants.

We, the Louisville Trust Company, principal and its capital stock and corporate property surety, bind ourselves, to the Commonwealth of Kentucky in the sum of $40,000.00 that the said Louisville Trust Company as receiver of the Evening Post Company, etc., to take charge of, collection, manage, execute and wind up the trust estate described in the petition and will faithfully discharge all of its duties as such and will comply with the judgment and orders of the court in the action, and will account for, pay and deliver to the parties in interest and entitled thereto all monies or properties due or belonging to them when required.

Witness our hands this 30th day of June, 1903.

THE LOUISVILLE TRUST COMPANY,
By H. V. LOVING, *Pres.*

Attest: JNO. H. PAGE, *Clerk*,
By WM. D. REED, *D. C.*

78 STATE OF KENTUCKY,
County of Jefferson, } *sct:*

I, John H. Page, clerk of the Jefferson circuit court, in and for the county and State aforenamed, do hereby certify that the foregoing 64 pages contain a true and correct copy of the following pleadings and all the orders in the case wherein W. N. Haldeman's Ex'or-, etc., are plaintiffs, and The Evening Post Company, *et al.*, are defendants.

#34244,

Petition filed May 12th, 1903;

Demurrer filed May 23rd, 1903;

Answer of R. W. Knott, etc. Filed May 23rd, 1903;

Answer of Columbia Finance & Trust Co. Filed May 23rd, 1903;

Opinion filed June 4th, 1903;

Grounds for objection of defendants to motion of plaintiff- to refer to commissioner and to appoint receiver; filed June 18th, 1903;

Reply filed June 18th, 1903;

Opinion filed June 27th, 1903;

Bond of Louisville Trust Company.

as the same appears of record and now on file in my said office.
Witness my hand, as aforesaid, this 1st day of July, 1903.

JOHN H. PAGE,
Clerk of the Jefferson Circuit Court,
By LEWIS MERIWETHER,
Deputy Clerk.

79 The report of the special commissioner above referred to is as follows:

In the Circuit Court of the United States for the Western District of Kentucky.

STUART R. KNOTT, Plaintiff,
vs.
EVENING POST COMPANY, Defendant.

The special commissioner makes the following report upon debts of the defendant, to this date, at the request of counsel. Interest is calculated to July 1, 1903:

1. Home & Farm Pub. Co., acc't	$2667.72
2. Home & Farm Pub. Co., note, July 1, 1901, one day	27973.10
Interest	2332.76
3. Home & Farm Pub. Co., note, Feb. 2, 1903, ninety days	475.00
Interest	9.50
4. Home & Farm Pub. Co., note, Feb. 2, 1903, four months	475.00
Interest	9.50
5. Home & Farm Pub. Co., acc't	9315.30
6. Citizens' national bank, note, April 4, 1903, 4 months, secured by 125 shares of Home & Farm stock	4000.00
Interest	60.00
7. Union national bank, Feb. 13, 1903, 4 months, note, secured by 81 shares Home & Farm stock	3750.00
Interest	84.37
8. Southern national bank, note, Feb. 24, 1903, 4 months	2500.00
Interest	50.00
9. Southern national bank, note, Apr. 30, 1903, 3 months	500.00
Interest	5.00
10. Southern national bank, note, Apr. 30, 1903, 4 months	500.00
Interest	5.00

11. Southern national bank, note, Apr. 4, 1903, 3 months		5000.00
Interest		75.00
12. R. W. Knott, note, Feb. 26, 1903, 4 months		5000.00
Interest		100.00
13. R. W. Knott, acc't		5863.43
14. Bank of Commerce, note, Apr. 23, 1903, 4 months.		2000.00
Interest		20.00
15. American national bank, note, Apr. 15, 1903, 4 months, secured by 40 shares, Home & Farm stock		700.00
Interest		8.75
		$74479.43
80 Amount brought forward		$74479.43
16. B. G. Boyle, acc't.		143.25
17. B. G. Boyle, note, May 14, 1900, 1 year..	$9500.00	
Interest	1258.75	
Note, Apr. 16, 1894, 1 year, secured by mortgage	9000.00	
Interest	4972.50	
		24731.25
18. Standard Printing Co., acc't		20.80
19. Walker, Williams & Longstreet, acc't		21.00
20. Morganthaler Linotype Co., acc't		4.71
21. Morganthaler Linotype Co., acc't		266.00
22. Peerless Wagon Works, acc't		34.70
23. Tinsley Engraving Co., acc't		266.35
24. The Henneberry Co., acc't		287.52
25. W. W. Stouffer, acc't		143.50
26. R. Knott & Sons, acc't		1582.87
27. J. R. Davidson, acc't		25.00
28. J. S. Kirtley, acc't		30.00
29. American Express Company, acc't		53.28
30. Overman, Shrader Cordage Co., acc't		26.00
31. Kelly, Foundry & Machine Co., acc't		280.20
32. Cumberland Tel. & Tel. Co., acc't		14.85
33. W. L. Drake & Co., acc't		6.00
34. City of Louisville, taxes		186.00
35. Comic Sketch Club, acc't		10.00
36. Western Union Tel. Co., acc't		1130.25
37. International Syndicate, acc't		79.25
38. The Bradley & Gilbert Co., acc't		17.93
39. New Evening Post Co.,		
Note, M'ch 10, 1903, 3 months	$1163.47	
Interest	21.32	
Note, M'ch 20, 1903, 1 month	1160.00	
Interest	19.33	
Note, M'ch 20, 1903, 2 months	1160.00	
Interest	19.33	
		3543.45

40. New Evening Post Co., acc't	2713.28
41. Udolpho Snead, acc't	1735.00
	$111861.87
81	
For'd	$111861.87
42. Signal Mail Box Co., acc't	1225.89
43. S. R. Knott, judgment	6000.00
Interest	60.00
Costs	15.75
	$119163.51

Respectfully reported.

THOS. SPEED,
Special Commissioner.

And on July 20th, 1903, the following order was entered:—

Circuit Court of the United States, Sixth Circuit, Western District of Kentucky.

S. R. KNOTT, Complainant,
vs.
EVENING POST COMPANY, &c., Defendants.

The court being now advised, returns its opinion herein which is filed and made a part of the record.

The motion herein entered on July 6th, 1903, by Louisville Trust Company, receiver, was heard on the bill of complaint, subpoenas, answers, orders herein entered and report of Thos. Speed, special commissioner and on the intervening petition of said Louisville Trust Company, and exhibits filed therewith, being transcript of record of cause of W. N. Haldeman's Executors *vs.* Evening Post Company &c., Jefferson circuit court, chancery division, and the transcript of the record in the cause of S. R. Knott plaintiff *vs.* Evening Post Company, #3938 on the docket of this court.

In consideration thereof, it is now adjudged, ordered and decreed as follows:

First. That the motion of the Louisville Trust Company, receiver herein, entered July 6th, 1903, asking that the assets in the hands of the receiver herein, Lewis C. Humphrey, be turned over to said Louisville Trust Company be and it is hereby overruled.

Second. That the intervening petition of said Louisville Trust Company be and it is hereby dismissed.

82 Third. That as the action of the court as above, rendered necessary a decision of the exceptions of the complainant to the said intervening petition the same are formally overruled.

The opinion above referred to is as follows:—

83 *Opinion.*

Hon. WALTER EVANS, *Judge:*

The Evening Post Company, a corporation, was organized under the provisions of chapter 56 of the General Statutes of Kentucky, on the first day of May, 1878. By its articles of incorporation it was to continue in existence for a period of 25 years, namely, until May 1st, 1903.

The complainant, a citizen of Missouri, holding the past due notes of the company for $6,000, brought a suit at law against it in this court for the recovery of a judgment thereon. The company having confessed the indebtedness and its non-payment, judgment was rendered accordingly, and soon afterwards an execution of *fieri facias* which issued thereon was returned *nulla bona*. This action in equity, in the nature of a creditor's bill, was instituted on May 27th, 1903, and on the following day, upon the motion of the complainant and by the consent of the defendants, Lewis C. Humphrey was appointed the court's receiver, and was directed, as such, to take possession of all the property of the Evening Post Company, which was accordingly done by him on that day. That property, before the issual of the execution, had been placed in the hands of the defendant, The Columbia Finance and Trust Co., as liquidator under a plan for winding up the affairs of the Evening Post Company adopted on April 30th, 1903, by the almost unanimous vote of its stockholders at a meeting held for that purpose. On the 28th day of June, 1903, the cause was referred to the master to advertise for ascertain and report to the court the debts proved against the company. On the 6th day of July, 1903, the master made a partial report, showing the names of the creditors, who, up to that
84 time, had proved their claims and the amounts of the latter, which aggregated $119,163.51. The gross indebtedness, when all the claims shall be proved, will probably increase that aggregate to $120,000 or over.

At this stage of the proceedings in this court the Louisville Trust Company, alleging itself to be the receiver of the Evening Post Company, appointed by the judgment of the Jefferson circuit court, chancery branch, first division, rendered June 27, 1903, in the action therein pending of Bruce Haldeman and others, executors of the will of W. N. Haldeman, deceased, *vs.* The Evening Post Company and others, presented and was given leave by the court to file its intervening petition herein, and having filed it, the said trust company thereupon moved this court for an order directing its receiver, Lewis C. Humphrey, to turn over to the State court receiver all the property of the Evening Post Company in his hands, and based this motion upon the ground, stated generally, that the State court, in the proceedings therein pending, had first acquired jurisdiction over the assets and property of the Evening Post Company and the consequent right to adjudicate all questions relating to its

administration and distribution among the parties entitled to share therein.

The application thus made raises the question of which of two courts of concurrent power shall control the administration and distribution of the assets of the Evening Post Company. Such conflicts are always somewhat embarrassing, not perhaps because either court is at all tenacious of its rights or especially anxious to perform the labors required, but rather because litigants become embittered or imagine that one court will take a view of the law more favorable to one than to the other of the parties in interest. The courts themselves, with the fullest respect for each other, and with a natural tendency to abdicate rather than to seize upon burdens, must consider merely what are the rights of the court and the litigants under the established principles of law applicable to such cases.

85 With nothing but the highest respect for the State court in this instance, coupled with the fullest determination to yield to it everything that established principles of law demand, I enter upon the consideration of the very interesting though perhaps not novel questions involved.

Accompanying the intervening petition of the Louisville Trust Company, the receiver appointed by the State court, is a transcript of the record in the case of Haldeman's Executors *vs.* The Evening Post Company, The Columbia Finance and Trust Company, trustee of the Evening Post Company, Richard W. Knott, J. M. Atherton, John R. Knott, Eugene Q. Knott and Laura G. Boyle, defendants, the last five of whom are called in the petition individual defendants. This suit in the State court was commenced on May 12, 1903. The petition therein is too long to be copied in full in an opinion, but in substance it avers the following facts and nothing more, namely, that in June, 1898, their testator, W. N. Haldeman, acquired 48 shares of the capital stock of the Evening Post Company, which, at his death, came to their hands as part of the assets of his estate; that the capital stock of that company—$60,000—was divided into 600 shares of $100 each, which were claimed to be owned by certain of the defendants, as follows, namely, Richard W. Knott, 427 shares, J. M. Atherton, 65 shares, Laura G. Boyle, 50 shares, John R. Knott, 5 shares, and Eugene Q. Knott, 5 shares, besides the 48 shares owned by the plaintiffs; that under its charter the corporate existence of the company expired May 1, 1903; that the individual stockholders named, other than the plaintiffs, had for years been the officers and directors of the company, and had operated it as their own private property without any meeting of the stockholders or election of directors; that being informed about April 25th, 1903, that the charter of the company was about to expire by its own terms, the plaintiffs repeatedly demanded, both verbally and in writing, the right as stockholders to examine and inspect the books and affairs of the company, but that they were always absolutely and positively refused the right and opportunity to do so;

86 that they demanded repeatedly and were as often refused a statement of the assets and liabilities of the company and full

data respecting the same; that a meeting of the stockholders was called by the defendant- for April 30, 1903, which they attended, and that over their protest the stockholders adopted a resolution in the following language:

"Whereas, the charter of the Evening Post Company will expire on the first day of May, 1903; and,

Whereas, it has become necessary to have all the assets of every character of the company sold for the purpose of paying its debts and distributing the surplus, if any, among the stockholders; and,

Whereas, it is impossible to properly advertise and sell said property by the 1st of May next; therefore, be it

Resolved, first, That the Columbia Finance and Trust Company be and it is hereby appointed liquidator of the affairs of the corporation, with directions to operate for the use of the stockholders the affairs and business of said corporation as they have been operated until the property can be properly advertised and sold and the possession thereof delivered to the purchaser.

Second. That prior to the said sale the liquidator shall cause to be made for the use of the stockholders a comprehensive statement of the assets and liabilities of the corporation, and furnish said stockholders with a copy of said statement.

Third. That the said liquidator shall in its advertisement specify the nature of the articles to be sold, and shall make sale for cash to be paid on the delivery of possession, and shall require of the purchaser that he deposit a certified check for an amount equal to one-third of the total purchase price which the liquidator shall hold and credit upon the purchase price when the sale is consummated, or, if for any reason it shall be set aside, return to the bidder. If the said bidder to whom the property is knocked down shall fail at once to deliver to the liquidator the certified check, as herein provided, the liquidator shall immediately re-sell the property and refuse to receive bids from said former bidder.

Fourth. Said liquidator may in his discretion employ an auctioneer or other agent necessary or proper to be used in the sale of the property.

Fifth. Until said sale, and during the operation of said property, said liquidator is given full authority and permission to employ such agents and persons as may be necessary to properly, conveniently and economically operate the property, and keep an account of all its expenses and take vouchers therefor. And after the property has been fully administered it shall make out a comprehensive account of its acts and doings, and shall furnish a copy thereof to each of the stockholders.

Sixth. The said liquidator shall from the proceeds of the sale of the property pay all debts of the corporation, and the balance, if any, shall be distributed among the stockholders according to their legal rights."

The petition further alleged that on April 30, 1903, the said liquidator qualified as such; that the plaintiffs renewed their demands to it and that it also has denied and refused to grant any of

them; that they do not know and are not advised as to any indebtedness of the company, nor how it was created or secured, nor
87 are they advised of the assets of the company; that they can only obtain such information from the books of the company, which are under the control of the individual defendants, who positively refuse to allow the plaintiffs any access thereto or any statement of their contents; that they are informed and believe that the defendants are still conducting and operating the business of the company and at great loss and expense; that they have the right to inspect at reasonable times the books and affairs of the company, and to ascertain its financial condition, and that they are wrongfully denied that right by the defendants who also refuse to give them any statement of the financial condition of the company or of its assets and liabilities; that the liquidator is advertising and calling upon all the creditors to present their claims properly proved by June 1, 1903; that they are advised that the individual defendants have taken over to their own use and are now using all of the property and good will of the company; that in law and in equity and in good conscience they are entitled to an inspection of the books and affairs of the company, but though often demanding it, they are always refused; that the assets of the company are or should, in right and law and equity, be of the value of $60,000 at least, and that the maximum liabilities under the charter should not be over two-thirds of that sum, or $40,000; that they do not know and cannot state what either the assets or the liabilities of the company are other than the capital stock; that notwithstanding the charter fixed the maximum limit of indebtedness of the company at $40,000, yet the total indebtedness exceeds $109,000, and that the individual defendants constitute all or nearly all of the creditors of the company; that the books of the company show or should show the extent, character and origin of the indebtedness, the nature of the transactions out of which they grew, and that without an inspection of the books and papers of the company they cannot ascertain the facts nor whether the debts are valid and binding obligations of the company, and that, notwithstanding the individual defendants are managing the affairs of the company and have
88 the custody of its books and papers, they refuse plaintiffs all access to them and all information from them and all right and opportunity to inspect them; that to the end that the affairs of the company may be wound up and liquidated, and that they may be fairly dealt with according to law, an inspection of the books is necessary; that proper information to this end cannot be derived from a mere copy of the books and papers nor from the conclusions and statements of an accountant or bookkeeper; that the individual defendants claim to be all the creditors of the company, and the complainants know of no one else who claims to be a creditor thereof, and they are all called upon to set up and prove their demands to the end that the affairs of said company may be liquidated and settled in that suit; that it is impracticable and impossible to have a fair, just and proper accounting and settlement of the business and

affairs of the Evening Post Company except in that suit, and that in view of the persistent conduct of the defendants therein, the plaintiffs will not and cannot be informed or advised of the assets and liabilities of the company until the defendants are compelled to furnish such information, and to allow the plaintiffs to inspect and examine the books, accounts and affairs of the company; that the individual defendants are claiming and insisting that there is a great value attached to the good will, name and the operative plant of the Evening Post Company, including the telegraphic and other correspondence facilities, built up, acquired and established by it, which would be endangered and probably lost if the publication of said newspaper by it were abandoned, and that in order to preserve it and to get the benefit of — the defendants claim that the newspaper should be operated pending the closing up and liquidation thereof to the end that its good will, name and facilities aforesaid may be sold to the best advantage, but the plaintiffs state that they are not informed and have no means of knowing as to what the value of the good will, name and facilities aforesaid are, nor as to whether there is any value thereto, and that they cannot have or form
89 an opinion touching the same without a full and free inspection of the papers, documents, books and accounts of the Evening Post Company. The prayer of the petition is in this language:

"Wherefore, the premises considered the plaintiffs pray for a settlement of the accounts of the Evening Post Company, and of the Columbia Finance and Trust Company as liquidator thereof herein, and that this cause be referred to the commissioner of this court to audit, state and settle the accounts of the Columbia Finance and Trust Company, as trustee or liquidator of the affairs and business of the said Evening Post Company; that a full, true and correct accounting of the business and affairs of the said Evening Post Company, and of the liabilities against the same, be ascertained and reported, and the assets sold and disposed of and distributed amongst the parties thereto according to their respective interests.

Plaintiffs further pray that pending this action, and until the final liquidation of the affairs of the Evening Post Company and the sale of its plant and assets, that the court herein determine as to whether or not the affairs of the said Evening Post Company should be continued in operation, and, if so, that the operation of the said plant be conducted under and subject to the orders of the court herein.

And the plaintiffs further pray that a mandatory preliminary order be entered herein commanding and directing the defendants, and each of them, to allow the plaintiffs reasonable access to and an examination of the books, papers, documents and affairs of the said Evening Post Company, including all documentary information in connection therewith which is in the possession of the defendants or any of them.

And the plaintiffs further pray for their costs herein expended,

and for all such proper and equitable relief as the nature of the case may demand."

It appears also from the transcript accompanying the intervening petition that the Evening Post Company and the individual defendants on May 23, 1903, filed an answer to the petition in the State court in which they expressly denied many of its material allegations, and, contesting the rights claimed by the plaintiffs, among other things urged, and at the argument they insisted, that the purpose of the plaintiffs was to acquire information which would benefit their own publications, viz., the Courier-Journal and the Times at the expense of their competitor, the Evening Post, but while the last named matter could be given such weight as might be thought to be proper by the State court to which it was addressed, it seems to be quite immaterial upon any issue before this court.

It also appears from the transcript that the Columbia Finance and Trust Company, on May 23, 1903, filed its answer in the State court proceeding, and much significance seems to be attached
90 to the fact that it therein states that it submits itself to the jurisdiction of the court, and that it will, of course, obey all its orders, although at the same time it protests that it will be burdensome and unnecessary to subject the corporation to the costs and expenses of winding up its affairs in a judicial proceeding. Undue importance should not be given to this submission to the jurisdiction of the court by the answer of the liquidator, because, at last, its general language must be confined and limited to the scope of the plaintiff's petition when fairly ascertained.

Upon a preliminary hearing the learned judge of the State court ruled that the plaintiffs were entitled to inspect the books, &c., of the corporation, and on the 4th day of June, 1903, appropriate orders to that end were made to enforce that right. However, when the persons against whom those orders were directed were applied to it was developed that they no longer had any control over the books, because, previously thereto, viz., on May 28, 1903, they had all been turned over to the receiver of this court pursuant to its orders. On the 27th day of June, 1903, on the motion of the executors of W. N. Haldeman, the State court appointed the receiver who has made the motion we are now considering for an order requiring this court's receiver to turn over to the State court's receiver all the assets, &c., of the corporation, not at all for the inspection of the books, but altogether for the purpose of having those assets administered and distributed by the State court. I have been at pains to state accurately the averments of the petition in the State court suit, including even its repetitions, in order that we might certainly get its full scope and give it effect accordingly. While the prayer of the petition is much broader, the real scope of the pleading—the subject matter of the suit—must be determined by such of its averments as present a valid basis for the relief asked, for it cannot be that any relief can be properly granted except such as may logically follow if the averments of the pleading are true—that is to say, such as may be appropriate to the case made by the petition.

91 Upon an application of this character the proceedings in the State court upon which its receiver bases his claim are certainly open to inquiry so far as it may be necessary for the court applied to, to ascertain the merits of the application, for, if it acted upon mere suggestion only, it might do palpable injustice to the rights of litigants. Proceeding upon this view, and industriously endeavoring to ascertain the full scope of the litigation in the State court, I have not been able to find such averments in the petition of Haldeman's executors as would authorize any relief except that of an inspection of the books, papers and affairs of the Evening Post Company. That relief seems to be absolutely all that the plaintiffs therein could legitimately obtain on the case made by their pleading. With the claim to that relief this court has neither disposition nor right in the slightest degree to interfere. It is only because it is asked to surrender property in its possession, and which has been seized at the suit of creditors to the end that it may be subjected to their demands, that we look into the proceedings of the State court at all, for, otherwise, our examination of them might be unauthorized. While as I think the scope of the petition in the State court was limited to the claim of the plaintiffs to examine the books, &c., it is insisted that the prayer broadens that scope, but it seems to be a sufficient answer to this to say that the rights of a litigant must be measured, not alone by his prayer for relief, but by the case made by the facts stated in his pleading.

It is also insisted that the petition shows that the resolutions appointing the liquidator created a trust and the liquidator a trustee, and that the petition, to the end that the trust should be enforced and the affairs of the corporation wound up, called upon the defendants and all others who are creditors to prove their debts so that the affairs of the company might be settled in that suit. Do these matters afford any grounds for surrendering the corporate assets to the State court receiver?

92 While the capital stock and property of a corporation are regarded as trust fund for the payment of its debts, it can hardly be maintained that they are a trust fund for the payment of stockholders. Their right is ownership and the trust fund doctrine does not reach them.

It is to be remembered that the plaintiffs in the case in the State court are stockholders and nothing more, that they own 8 per cent. and no more of the capital stock that they do not allege that the corporation is insolvent, and that their petition does not claim that they are entitled to the appointment of a receiver nor to a seizure of the corporate assets upon any ground whatever. Their demand, possibly a most reasonable one, was to inspect the books, &c., so that they could understand the condition of the company in which they had an interest. The corporate existence of the company was on the eve of expiration, and a very large majority of the shareholders desired either to reorganize so as to continue the business or else in some way to secure as large a price for its assets as possible. While the 25 years expired May 1, 1903, yet section 13 of chapter 56,

General Statutes of Kentucky, and section 561 of the Kentucky Statutes, which is an amendment thereof, fully authorize the corporation to continue to act though only for the purpose of closing up its business. No precise mode for doing this is prescribed and probably was not at all desirable, but all corporations in all stages of their existence must act by agents, and in this instance, in order that the business of the corporation might be closed, it, at a full meeting of its stockholders, adopted the plan of having it done by a responsible trust company as an agent, called a liquidator, selected by themselves. This company was an agent merely to perform the legitimate work and duty of closing up the business of the corporation. While in a general way all agents are trustees, an appointment of one does not make the corporate assets a trust fund in this case any more than would the appointment every day of corporate agents constitute them trustees in such a sense as to put all the corporate assets into the shape of trust funds to be administered in equity unless other most material circumstances arise. Ninety-
93 two per cent. of the stock was voted in favor of the plan adopted in this case, while only 48 shares, owned by Haldeman's executors, voted against it. The authorities all agree that when one buys the stock of a corporation he impliedly agrees to submit to the rule of the majority, and that if the acts done by a majority are *intra vires* and without fraud they are binding. Dudley *vs.* Kentucky High School, 9 Bush 576, Cook on Corporations, sec. 684, Clark & Marshall on Private Corporations, sec. 628. Hence we can see no reason why, as between the shareholders in this case, the plan adopted was not entirely permissible, especially as it was evidently supposed to be an expeditious and inexpensive way of accomplishing the desired result. To permit 8 per cent. of the shareholders to defeat this plan would be to give control to a small minority rather than to a large majority, and that, too, in a case where, at least on its face, no perceivable wrong to any one appeared to inhere in the plan adopted. Of course the chancellor may well be applied to by any shareholder whether in a minority or not to prevent the destruction or injury of any of his rights by wrong doing, but no right of his is violated by merely outvoting him upon a matter fairly within the rights of those who do it. An appeal to the courts in such a case can generally only be made when fraud or some violation of law or of the rights of some person in interest can be alleged. As nothing of that sort can be fairly said to be charged in this instance, either against the liquidating agent or the corporation, unless it be the refusal of inspection of the books, it seems too clear for further argument that there is nothing charged in the petition of Haldeman's executors which would in any way entitle them to have the State court seize the corporate assets. It might be that under some circumstances a court of equity could remove an unfaithful trustee by a direct proceeding for that purpose, but while it might do that and appoint another in his stead, it would not necessarily follow that it could seize the corpus of the trust fund because an agent has been unfaithful. Nor could such seizure

be justified by any mere failure or refusal to allow an inspection of books. But here there can be no claim and there is
94 none that the liquidating agent was corrupt or unfaithful.

As before remarked, no express mode for closing the business of corporations is prescribed by the statute. That matter is wisely left to those most interested to do it in such way as may suit them, subject, of course, to the right of anyone to go into court if his rights are violated. But I conclude that there is no fact alleged in the State court proceeding which would give that court any right to seize the property of the Evening Post Company, nor to give any relief except that of inspecting the books, &c.,—a right of the executors of Mr. Haldeman which that court alone in the then aspects of the case could determine. And it is certain that nothing else was attempted, and that no seizure was made until after the property of the corporation was all in the hands of the receiver of this court.

But even if these views be unsound, the case goes far beyond this phase of it. The complainant in the creditors' bill filed in this court was not a shareholder but a judgment creditor. Creditors are to be cared for before the stockholders who owe them. The complainant creditor, a citizen of Missouri, on behalf of himself and all other creditors of the corporation, exercising a right plainly given him by the laws of the United States, in the regular way applied to this court for the protection and enforcement of his rights before it appeared that any stockholder was doing more than seeking to obtain information as to the status of the affairs of the corporation. In due and orderly course, and by the proper and legitimate processes of the court, the property of the debtor was seized for the purpose of satisfying the demands of its creditors one month before the State court appointed its receiver, and this court has ever since had it in due course of administration.

As already indicated, the petition filed in the State court, even if we disregard the answer thereto and assume its averments to be true, does not state facts which would authorize a court of equity to seize the corporate assets at the instance of a stockholder, nor did the pendency of that suit *per se* create a lien thereon, nor
95 indeed was anything done or attempted in the State court which brought the assets of the corporation within the grasp of the law either actually or potentially within the meaning of those terms as used in cases where there is a conflict of jurisdiction, until some weeks after those assets had been placed in the hands of the receiver of this court. After that was done, though no receiver had been asked for in plaintiff's petition, the State court receiver was appointed on their motion.

Stated broadly, the question to be determined is this: Which of the two courts under the facts stated first acquired jurisdiction over the assets of the Evening Post Company? I mean over the assets and not merely over the corporation for the purposes of securing the relief to which the stockholder was entitled on the facts stated in the petition—a distinction most important to be remembered. Was it the State court in the stockholders' suit where no receiver was origi-

nally asked for and where the real relief sought by a mere stockholder was the right to look at the books, or was it this court wherein a judgment creditor in a direct proceeding first caused a judicial seizure to be made of the property itself in order to subject it in due course to the corporate debts? Put in another form the question might be this: Does anything appear from the record of the proceedings in the State court which would, notwithstanding the undisputed facts appearing from the record in this court, entitle the stockholder to insist that the rights first obtained by a judgment creditor should be subordinated to those of the mere stockholder? It is insisted that the authorities unanimously hold that where the same subject matter is brought before different courts of concurrent power the court which first acquires jurisdiction, and especially the first which either actually or potentially acquires jurisdiction or control over any property which may be involved or seized, is entitled to decide every question, and that comity requires the other court to yield. Undoubtedly this general proposition is as true as it is elementary, but it has frequently occurred to me in investigating this and similar questions that in no class of cases is it
96 more necessary to remember what was said by Chief Justice Marshall in Cohens *vs.* Virginia, and cited by Chief Justice Fuller in delivering the opinion of the court in Pollock *vs.* Farmers' Loan and Trust Co., 156 U. S. 574. The language referred to was this:

"It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

In Peck *vs.* Jenness, 7 How. 612, an attachment, issued from the State court, had been levied on property of a defendant some time before he went into bankruptcy, and the assignee in bankruptcy afterwards applied to the State court to turn over to him the property thus levied upon, but the Supreme Court held that he was not entitled to have it done because before the bankruptcy proceeding was instituted another court had seized the property by its processes and then had it in its custody. It may be observed that the bankruptcy law then in force was different from the present statute, but the same result would necessarily still follow if an attachment should be levied more than four months before an adjudication.

Orton *vs.* Smith, 18 How. 263, was a case where there were conflicting claims of title to certain lands in Wisconsin, and some of those claims were being litigated in the State court, when the complainant filed a bill in equity in the Federal court to quiet his title to the land and enjoin one of the defendants from proceeding in his

case previously pending in the State court about the same land. The Supreme Court held that this could not be done. It is rarely the case that one court can enjoin proceedings in another.

In Taylor *vs.* Carryl, 20 How. 586, a vessel had been seized under an attachment issued from the State court, when a libel was filed against it in the Federal court by seamen who claimed wages, and the vessel was sold under the judgment of each court. When the question was brought before the Supreme Court it held that
97 as the State court first seized the vessel it could not be divested of its power over it by the subsequent proceedings in the Federal court, even if the case was one in admiralty, and that the purchaser at the sale under the judgment of the State court acquired the title as against the purchaser under the judgment of the Federal court.

In Shaw *vs.* Lyman, 79 Fed. 2, the question appears to have been whether the pendency in the State court of a suit between the same parties on the same cause of action was a bar to a creditor's bill in the Federal court to fix the personal liability of directors and stockholders in a corporation. The court answered it in the negative.

Owens *vs.* Ohio Central R. R. Co., 20 Fed. 10, presented a case of several applications to different courts by different parties for the appointment of a receiver for the same railroad, and each court having acted, Judge Jackson, in West Virginia, held that that receiver should be preferred who was appointed in the suit in which process was first served.

In Shields *vs.* Coleman, 157 U. S. 169, it was held that a circuit court of the United States has not the power to appoint a receiver of property already in the possession of a receiver duly and previously appointed by a State court, and cannot rightfully take the property out of the hands of the receiver so appointed by the State court.

In Harkrader *vs.* Wadley, 172 U. S. 148, it was held that when a State court had entered upon the trial of a criminal case of which it had jurisdiction a Federal court would not interfere by writ of *habeas corpus*.

In Kitz *vs.* Jenks, 185 U. S. 155, the controlling question as stated by the court was whether the sale of land under a deed of trust stands in the way of its redemption by a party in interest upon payment of the debt secured by the deed of trust, and the court answered the question in the affirmative.

The questions decided in the very recent case of Messrs. Watts & Sachs can have no application to this case, although it is true that in its opinion the Supreme Court remarked that as the assets of the bankrupt under the bankruptcy law belonged to the trustee,
98 comity seemed to require that the State court should have promptly turned them over to that officer, notwithstanding the pendency of the litigation in that court.

In the case of Phelps *vs.* The Mutual Reserve Fund Association it was supposed by this court that the appointment of the State court receiver was void as having been made without jurisdiction under the Kentucky practice, and therefore that the case was not covered

by section 720 of the Revised Statutes of the United States forbidding injunctions against proceedings in a State court, but the court of superior jurisdiction thought otherwise. Yet these together with the case now to be mentioned are the authorities mainly relied upon by the counsel of the State court receiver, and also indeed by the learned judge of the State court, as the basis of the conclusion reached by him in the opinion delivered in that court. That other case is Farmers' Loan and Trust Co. *vs.* Lake Street R. R. Co., 177 U. S. 51, in which it appears that the Farmers' Loan and Trust Co., on January 30, 1896, filed in the Federal court its bill as trustee to enforce a mortgage executed by the railroad company. Subsequently, but on the same day, the railroad company brought its suit in the State court to remove the trust company as trustee upon certain grounds alleged in its bill. A petition was filed for the removal of the case to the Federal court, but the State court refused to do it. Subsequently the transcript was filed in the Federal court, and a motion to remand the case was overruled. However, the State court proceeded in the cause and rendered its decree in favor of the plaintiff, and from that decree an appeal was prosecuted to the Supreme Court of the United States. That court waiving the questions of the right of removal held that the State court had erred in enjoining the Farmers' Loan and Trust Co. from acting as trustee and in enjoining it from proceeding in the suit in the Federal court. In the opinion in this case may be found general expressions which could be cited in support of either side of the present controversy.

99 Coming now to the consideration of the question from the standpoint of the judgment creditor and of the receiver of this court, it is difficult to see how their contention is antagonized by the cases of Peck *vs.* Jenness, Taylor *vs.* Carryl, or by Shields *vs.* Coleman, or indeed by any of the cases cited on behalf of the State court receiver, although in some of them there is the general statement of the doctrine that the court first getting jurisdiction is entitled to control the litigation. The three cases last named would indeed seem quite strongly to favor the contention of the side opposed to the State court receiver's motion.

In Wiswall *vs.* Sampson, 14 How. 52, it was held that where real estate is in the custody of a receiver appointed by a court of chancery a sale of it under an execution issued on a judgment at law from another court is illegal and void.

In Freeman *vs.* Howe, 24 How. 451, the marshal had levied an execution issued from the Federal court on certain railroad cars, which were afterwards taken out of his hands by the sheriff under a writ issued in a replevin suit instituted in a State court. It was held that this was entirely irregular, and on page 455 of the report the court said that "according to the course of decision in the case of conflicting authorities under a State and Federal process, and in order to avoid unseemly collision between them, the question as to which authority should for the time, prevail, did not depend upon the rights of the respective parties to the property seized, whether the one was paramount to the other, but upon the question, which

jurisdiction had first attached by the seizure and custody of the property under its process."

The doctrine of this case again came under review in the case of Covell *vs.* Heyman, 111 U. S. 176. There the plaintiff brought her action of replevin in the State court against a deputy marshal of the United States who had levied upon the property in question under an execution against one Adolph Heyman. Judgment having been rendered against the deputy marshal, *he* sued out a
100 writ of error to the Supreme Court, which reversed it, and at page 180 of the report, through Mr. Justice Matthews, said: "The principle is that whenever property has been seized by an officer of the court, by virtue of its process, the property is to be considered as in the custody of the court, and under its control for the time being; and that no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises."

In Moran *vs.* Sturges, 154 U. S. 274, a case in which the general question was elaborately discussed, the Supreme Court, speaking through Chief Justice Fuller, said: "It is a rule of general application that where property is in the actual possession of one court of competent jurisdiction such possession can not be disturbed by process of another court." The court in its opinion also referred to the case of Porter *vs.* Sabin, 149 U. S. 473, as strongly supporting the same doctrine. It may be remarked that this doctrine is also sustained by the case of Hazelrigg *vs.* Bronaugh, 78 Ky. 62.

In Heidritter *vs.* Elizabeth Oilcloth Co., 112 U. S. 294, it was held that where proceedings *in rem* are commenced in a State court and analogous proceedings *in rem* in a court of the United States against the same property, exclusive jurisdiction for the purposes of its own suit is acquired by that court which first takes possession of the *res*.

In the case of Opdyke & Calhoun *vs.* The St. Louis & Southeastern R'y Co., brought in this court in 1874, the precise question involved in this case was discussed perhaps as elaborately and fully as in any case of the kind in which the question ever arose. One Horner had obtained in the State court at Henderson, Ky., a judgment against the railroad company for damages for personal injuries. An execution thereon having been returned *nulla bona*, Horner instituted an action in equity in the State court under section 474 of Myers' Code to subject the assets of the railroad company to its payment. In his petition in that case he expressly prayed for the appointment of a receiver.
101 Certain trustees under mortgages also intervened in that suit, and asked the same relief. Notice was given that on October 19, 1874, a motion for the appointment of a receiver in the action would be made, but the judge of the court being detained by an obstruction to steamboat navigation, could not reach Henderson on that day, and the respective counsel agreed upon a future day for hearing the motion. With full knowledge of these facts, Opdyke

& Calhoun, the trustees under another mortgage, on the next day, namely, on October 20th, 1874, filed their bill in this court, alleging default in the payment of certain interest coupons, the insolvency of the railroad company, and the inadequacy of its property to pay the mortgage debt, and themselves prayed also for the appointment of a receiver. The railroad company entered its appearance on that date, and filed its answer, and with its consent a receiver was at once appointed by this court. Thereafter a receiver appointed by the State court made an application to this court similar to the one now being heard. The case was most elaborately argued before Judge Emmons and Judge Ballard, on one side by such counsel as the present Justice John M. Harlan, Ashbel Green, W. S. Opdyke, and others, and on the other side by such able lawyers as Harvey Yeaman, S. B. Vance, Gov. Thos. E. Bramlette, and others. After the most mature consideration the application of the State court's receiver was denied upon the ground that though the action in the State court was first instituted, this court had in fact first appointed a receiver, and had thereby first acquired possession of the property to be administered. Having been myself of counsel in that case, and most actively engaged in the litigation, I am able to state the facts with perfect accuracy, although in those days written opinions were not so frequently filed as they are now, and none was filed in disposing of that question.

In Griffiths *vs.* Mt. Sterling Coal Road Co.—a case almost identical with the one just mentioned, and wherein the receiver of the State court attempted to seize property in the hands of the previously appointed receiver of this court—my learned predecessor, Judge
102 Barr, made a similar ruling upon similar grounds.

In Powers *vs.* Bluegrass B. & L. Asso'n, 86 Fed. 705, Judge Lurton, sitting in this court, passed upon a case which cannot be distinguished in principle from the one now before us. There it was shown that a suit touching the same subject matter was already pending in a State court, but it appeared that the property of the corporation had not been taken into judicial custody. In his opinion the learned judge, after remarking, as I do also in this case, that it could be no disrespect to the State court if this court simply maintained its own jurisdiction and no more, said (page 707): "The principle that, where property is in the actual possession of one court of competent jurisdiction, such possession cannot be interfered with by the process of another court is well settled." He therefore reached the conclusion that there was nothing in the fact of the previous pendency of the suit in a State court unaccompanied by a seizure of property which should prevent the appointment of a receiver, and one was accordingly appointed. A general assignment had there been made by the directors of a perfectly solvent corporation without the authority of the stockholders, and while it was thought entirely possible that this act was voidable at least, because it was not authorized by the stockholders nor provided for by the Kentucky law, still it was supposed that it could be ratified by the stockholders. And so it may be remarked that while section

561 Ky. Stats. may not expressly authorize the appointment of an agent called a liquidator, still, to use the language of Judge Lurton, the stockholders might adopt it "as a mode of liquidation within the general powers of the corporation."

Byers *vs.* McAuley, 149 U. S. 608, is instructive upon the question, and so also are the cases of Buck *vs.* Colbath, 3 Wallace 334, Watson *vs.* Jones, 13 Wallace 674, and The Lottawanna, 20 Wallace 223.

The question we are considering has usually been discussed in cases where the right to control or administer property was involved, and the principle to be deduced from the decisions seems manifestly to be this: Wherever suits are pending in two or more courts
103 of concurrent powers, in each of which at the instance of different plaintiffs, it is sought to control or to subject to the demands of creditors, the same property, that court alone has the right to do so which first gets the property within its grasp by some recognized mode of judicial seizure, and that, too, without regard to the question of which suit was first instituted. The mere priority of commencement of litigation is not, but the priority of judicial seizure is, the test of jurisdiction over the *res* in all cases where property is the subject of contention. This test is simple, direct and practical, and draws a line which is palpable. It is of easy solution and cannot be open to serious mistake. Being established as the true test, it obviates the need of any resort to mere theories, and leaves the court which, in fact, and presumably always properly, brought the property itself *in gremio legis*, to administer or control it to the exclusion of all other courts, and without leaving open the possibility of unseemly wranglings with any person who may have been disappointed in his later efforts. Some test must be recognized by all, and the palpable and practical one of first judicial seizure is not only convenient but wise.

It has never been doubted that a second suit brought by the same plaintiff against the same defendant on the same causes of action in courts of the same sovereignty would be defeated by a plea in abatement, but this is not, unless in a very remote sense, upon the ground that the court in which the first suit was brought acquired jurisdiction to the exclusion of all others, but is primarily upon the ground that a defendant should not be vexed by two such suits at the same time. Where the two suits, however, are in courts of different sovereignties the rule does not apply according to the doctrine of the courts of the United States, (Gordon *vs.* Gilfoil, 99 U. S. 169), though the Kentucky courts seem to follow a different rule (Wilson *vs.* Milliken, 103 Ky. 165). But the general rule is everywhere limited to suits between the same parties upon the same causes of action. It neither has nor can have any reference to suits by different plaintiffs against different defendants upon different causes of action, although the suits may be nearly re-
104 lated and may ultimately seek to subject the same *res*. Where different individuals, acting upon the right plainly possessed by each to choose a forum, go into different courts to en-

force different rights against the same property, we have a case which calls into play and operation the principles upon which the pending motion must be determined. It is in such cases that what is called a conflict of jurisdiction arises and in which the doctrine of judicial comity must have sway. That comity, being based upon common sense, should not be manifested in mere courteous surrenders of what somebody else asks, but should, as the word implies, be a recognition of the just rights of another court as those rights may be ascertained upon established principles. It does not ordinarily depend upon the question of which suit was first brought nor upon priority of service of process, for these matters may, from the nature of the litigation, affect only the question of jurisdiction over the person, and which, *per se*, cannot concern litigants in other causes in other courts. Where different plaintiffs lawfully choose different forums to enforce different rights, the question of priority of service of process so as to give jurisdiction of the person of the defendant would be abstract and immaterial as to the suits of third parties unless property was seized, but if the same property is seized by the process of both courts, then, as only one of them can control it, some test must be found for ascertaining which of them shall do so, and it is believed that no case of this sort can be found in the courts of the United States at least, in which any test was acted upon except that of prior judicial seizure. Where the question, therefore, is one of jurisdiction over the *res* and not merely over the person, its solution must, logically and necessarily, depend upon the priority of custody of the *res* which both courts are asked to control. If we have been right in supposing that jurisdiction over the *res* can only be acquired by some form of judicial seizure—some form of procedure by which it is actually brought within the grasp and custody of the court—then the inquiry admits of no difficulty.

I by no means intend to say that the rule as to the first ac-
105 quirement of jurisdiction over the *res* depends in all cases upon an actual seizure as in admiralty or under the internal revenue or customs laws or by replevin or under an execution or attachment or through a receivership. The judicial custody of property to which I refer may sometimes be acquired in a somewhat less positive way. For example, it may, in some cases and as to certain parties, be accomplished by a *lis pendens* (Miller *vs.* Sherry, 2 Wallace, 235), or, as against parties to the suit, there may be an equitable levy by virtue of the suit itself where equitable assets are sought to be subjected by means of a creditor's bill (Commissioners *vs.* Earle, 110 U. S., 710), though in all such cases there must be a suit upon a judgment and a return of *nulla bona;* or there may be cases where the property is in the custody of the probate court by reason of its having been committed to the hands of an administrator, executor or curator (Byers *vs.* McAuley, 149 U. S., 608). But while in these cases the property is only potentially—that is, constructively—*in custodia legis*, it is nevertheless so under a certain form of judicial stress and by virtue of a judicial proceeding, the nature of which must be appropriate to that result.

Upon a most attentive consideration of the whole case I have reached these conclusions: First, that the proceedings in the suit in the State court, when given their just effect, had not, in any way, when this court's receiver was appointed, brought into the custody of that court any property of the Evening Post Company, nor could they be regarded as having, in fact, done so even if their scope were measured by the prayer of the plaintiff's petition rather than its averments; second, that it was, therefore, open to this court to appoint a receiver, and thereby judicially seize the property of the company at the instance of a judgment creditor; and, third, that having thus first acquired jurisdiction over the property thus seized, the established principles of law and the plain rights of the judgment creditor demand that this court shall maintain its jurisdiction over it under these circumstances as certainly as it would have abandoned it if the first seizure had been by the State court.

106 It results that the motion of the intervening petitioner must be overruled and denied and intervening petition dismissed. Judgment may be prepared accordingly.

Having reached this conclusion I have not deemed it important to consider the exceptions to the intervening petition filed by the complainant, and they are *pro forma* overruled.

107 And on the same day, to-wit, July 20, 1903, the following order was entered:

Circuit Court of the United States for the Western District of Kentucky.

STEWART R. KNOTT, Complainant,
vs.
EVENING POST COMPANY ET AL., Defendants. } Order.

Upon consideration of the petition for appeal to the Supreme Court of the United States filed herein by the Louisville Trust Company, as receiver of the Evening Post Company under appointment by the Jefferson circuit court, chancery branch, first division, of Kentucky, it is ordered that said appeal be granted, bond therefor fixed in the penalty of $500.00, which, having been executed, is now approved by the court.

This appeal is granted solely upon the question of jurisdiction over the subject-matter of the trust estate of the Evening Post Company in controversy, and the question of whether this court, or the said Jefferson circuit court, chancery branch, first division, has prior jurisdiction in the single question upon which this cause is decided as to the said Louisville Trust Company, this court holding that its jurisdiction over the said trust estate of the Evening Post Company is prior and exclusive of the said Jefferson circuit court, chancery branch, first division, all of which is hereby certified on the appeal

of the said Louisville Trust Company as receiver, &c., to the Supreme Court of the United States for review as required by law.

WALTER EVANS, *Judge*.

The petition for an appeal and assignment of errors herein are as follows:

Circuit Court of the United States for the Western District of Kentucky.

STUART R. KNOTT, Complainant,
vs.
EVENING POST COMPANY ET AL., Defendants. } No. —.

Petition of the Louisville Trust Company, receiver of the Jefferson circuit court, chancery branch, first division, for an appeal to the Supreme Court of the United States.

Your petitioner, The Louisville Trust Company, suing as receiver of the Evening Post Company, respectfully represents that there was manifest error committed to the injury of your petitioner by the final decree pronounced in this cause on the 20th day of July, 1903, and by the interlocutory orders and decrees theretofore pronounced herein, in and by which said orders and decrees this court assumed and asserted exclusive jurisdiction, custody and control of the property and effects, including the books, papers and documents belonging to and constituting the estate of the Evening Post Company as against the lawful prior custody and possession thereof by the Jefferson circuit court, chancery branch, first division, of Kentucky, in the cause then already pending in the said court entitled W. N. Haldeman's Executors &c., *vs.* Evening Post Company, &c., under jurisdiction theretofore fully attached and lawfully exercised and assumed by said State court; the said chancery State court being a court of equity and of concurrent jurisdiction with this court over the estate in controversy, whereby the said Jefferson circuit court, chancery branch, first division, was thereby wrongfully ousted by this court of its lawful and first acquired jurisdiction, and your petitioner, as receiver appointed by the said court therein, became and is deprived of the lawful custody and possession of the property and estate of the said Evening Post Company, the subject-matter of controversy then and there pending in said court being identical with the subject-matter of controversy subsequently brought in this court.

Your petitioner represents that the said Jefferson circuit court, chancery branch, first division, is a court of concurrent jurisdiction with this court, and that it acquired full and complete jurisdiction of the trust estate of the said Evening Post Company long before this court acquired any jurisdiction thereof; that the parties interested in the said trust estate were brought before the said
109 State court of concurrent jurisdiction with this court by service of process, and by appearance and answers filed therein long

before the institution of this suit, and the said State court was and is vested with exclusive jurisdiction of the subject-matter of this controversy, all of which fully accrued before the institution of this suit in this court.

Wherefore, your petitioner, The Louisville Trust Company, as receiver of the Evening Post Company, under the appointment of the Jefferson circuit court, chancery branch, first division, considering itself aggrieved by the decrees and orders of this court herein, as aforesaid, prays an order granting an appeal from the said final decree and interlocutory orders, taking and exercising jurisdiction by this court, as aforesaid, exclusive of the said State court, to the Supreme Court of the United States as authorized by section 5 of the act of Congress of the United States, approved March 3, 1891, and your petitioner herewith files its bond with surety in the sum of $500.00, which bond is approved by the Hon. Walter Evans, one of the judges of this court.

KOHN, BAIRD & SPINDLE,
DODD & DODD,
Counsel for Louisville Trust Company, Receiver.

Circuit Court of the United States for the Western District of Kentucky.

STUART R. KNOTT, Complainant,
vs.
EVENING POST COMPANY ET AL., Defendants.
No. —. Assignment of Errors.

Now comes the intervener, The Louisville Trust Company, receiver of the trust estate of the Evening Post Company under appointment of the Jefferson circuit court, chancery branch, first division, of the State of Kentucky, and files the following assignment of errors on which it will rely upon its appeal from the decree made by this honorable court on the 20t- day of July, 1903, dismissing its intervening petition herein, and denying its motion to compel Lewis C. Humphrey, receiver of this court, to turn over to it the said estate, to-wit:

110

I.

The said circuit court of the United States for the western district of Kentucky erred in deciding that its jurisdiction over the estate of the said Evening Post Company is prior to and exclusive of the previously acquired adjudication thereof of the Jefferson circuit court, chancery branch first division.

II.

The said court erred in denying the motion of the Louisville Trust Company, receiver, to compel Lewis C. Humphrey, receiver of this court, to turn over to it the estate of the said Evening Post Company in his custody and possession.

III.

The said court erred in denying the motion of the said Louisville Trust Company, receiver, to vacate the order appointing Lewis C. Humphrey receiver of the said Evening Post Company.

IV.

The said court erred in retaining jurisdiction of the subject-matter of the estate of the said Evening Post Company, and especially of its estate, books, papers and assets and documents to the exclusion of the previously acquired jurisdiction of the Jefferson circuit court, chancery branch first division, of the State of Kentucky.

V.

The said court erred in dismissing the intervening petition of the said Louisville Trust Company, receiver, and adjudging the costs incurred therein in favor of the complainant, Stuart R. Knott, herein.

VI.

The said court erred in refusing to grant the relief accordingly as prayed and moved for by the Louisville Trust Company, receiver of the Evening Post Company, under appointment of the Jefferson circuit court, chancery branch, first division.

Wherefore, the said complainant, Louisville Trust Company, receiver of the Evening Post Company under appointment of the Jefferson circuit court, chancery branch, first division, of the
111 State of Kentucky, prays that the foregoing be filed as its assignment of errors, and upon the hearing hereof by the Supreme Court of the United States that the said interlocutory orders and final decree be revised, reviewed and reversed with costs, and as in duty bound the said Louisville Trust Company, as receiver, will ever pray.

KOHN, BAIRD & SPINDLE,
DODD & DODD,
Counsel for Lou. Trust Co., Rec'r.

The appeal bond is as follows:—

Circuit Court of the United States for the Western District of Kentucky.

STUART R. KNOTT, Complainant,
vs.
EVENING POST COMPANY ET AL., Defendants. } No. —. Bond.

Know all men by these presents, that we, The Louisville Trust Company, receiver of the Evening Post Company under appointment of the Jefferson circuit court, chancery branch, first division of the State of Kentucky, as principal and Bruce Haldeman, a.

surety, are jointly and severally held and firmly bound unto the said Stuart R. Knott in the sum of $500.00 lawful money of the United States of America, his successors and assigns, for which payment well and truly to be made we bind ourselves, all and each of our heirs and successors jointly and severally, firmly by these presents.

Sealed with our seals and dated this 20th day of July, 1903.

The condition of the above obligation is such that whereas the said Louisville Trust Company, receiver of the Evening Post Company under appointment of the Jefferson circuit court, chancery branch, first division, of the State of Kentucky, has taken an appeal to the Supreme Court of the United States for review of the orders and decrees rendered and entered by the said circuit court of the United States for the western district of Kentucky, sitting at Louisville, which final decree was entered in the above styled suit on the 20th day of July, 1903.

Now, therefore, the condition of the above obligation is such that if the above named Louisville Trust Company, receiver, &c.
112 intervening claimant in said suit, and appellant on this appeal, shall prosecute the said appeal to effect and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

LOUISVILLE TRUST COMPANY,
Receiver of the Evening Post Company, &c.,
By H. V. LOVING, *President.*
BRUCE HALDEMAN, *Surety.*

Examined and approved
WALTER EVANS,
U. S. Circuit Judge, Western District of Kentucky.

113 WESTERN DISTRICT OF KENTUCKY:

I, Thomas Speed, clerk of the circuit court of the United States for the western district of Kentucky at Louisville, do hereby certify that the foregoing 112 pages contain a true and correct transcript of the record in the cause of Stuart R. Knott against The Evening Post Company *et al.* as the same appears from the files and records in my said office.

Witness my hand and seal of said court in the city of Louisville, this 23rd day of July, 1903.

[Seal 6th Circuit Court, Wes. Dist. Ky., U. S. of America.]

THOS. SPEED, *Clerk,*
By HENRY F. CASSIN,
Deputy Clerk.

Fee for this transcript $84.35 paid by the Louisville Trust Company receiver.

Attest: THOS. SPEED, *Clerk,*
By HENRY F. CASSIN, *D. C.*

114 Circuit Court of the United States for the Western District of Kentucky.

STUART R. KNOTT, Complainant,
vs.
EVENING POST COMPANY ET AL., Defendants. } Citation.

The President of the United States of America to Stuart R. Knott, Evening Post Company, Columbia Finance & Trust Company, R. W. Knott, B. G. Boyle, E. Q. Knott, Lewis C. Humphrey, receiver, and Home & Farm Publishing Company, Greeting:

You and each of you are hereby cited and admonished to appear at the Supreme Court of the United States at its October term to be held in the city of Washington, District of Columbia beginning on the second Monday of October, 1903, pursuant to an appeal this day granted by the circuit court of the United States for the western district of Kentucky, wherein The Louisville Trust Company, as receiver of the Jefferson circuit court, chancery branch, first division of the estate of the Evening Post Company is appellant, and you and each of you are appellees, to show cause, if any there be, why the decree and interlocutory orders in the said appeal mentioned dismissing the intervening petition of the said Louisville Trust Company, as receiver, &c., as aforesaid, with costs, should not be corrected, revised vacated and reversed and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice Supreme Court of the United States of America this the 20th day of July, 1903, and of the Independence of the United States one hundred and twenty-eight.

WALTER EVANS,
Judge of the Circuit Court of the U. S. for the Western District of Kentucky.

[Seal 6th Circuit Court, Wes. Dis. Ky., U. S. of America.]

Filed July 20th 1903
[SEAL.] THOS. SPEED, *Clerk.*

115 [Endorsed:] 6939. Stuart R. Knott *vs.* Evening Post Company *et al.* Citation.

We hereby acknowledge service of the within citation.
July 20th, 1903.
HUMPHREY, BENNETT & HUMPHREY,
For Complainant S. R. Knott.
HELM, BRUCE & HELM, *For Defendants.*

Endorsed on cover: File No. 19,040. W. Kentucky C. C. U. S. Term No. 389. The Louisville Trust Company, receiver of the estate of the Evening Post Company, appellant, *vs.* Stuart R. Knott *et al.* Filed August 3d, 1903.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903

Supreme Court, U.S.
FILED
OCT 5 1903
JAMES H. McKENNEY,
Clerk

No. 666

The Louisville Trust Company,
Receiver of Evening Post Company, . *Appellant*

vs.

Stuart R. Knott, et al., ... *Appellees*

BRIEF FOR APPELLANT

JOHN L. DODD,
DAVID W. BAIRD,
Attorneys for Appellant

J. C. DODD,
AARON KOHN,
T. W. SPINDLE,
Of Counsel

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 389.

The Louisville Trust Company, Receiver of the Evening Post Company, Appellant,

To

Stuart R. Knott, Evening Post Company, Columbia Finance & Trust Company, R. W. Knott, B. G. Boyle, E. Q. Knott, Lewis C. Humphrey, Receiver of the Evening Post Company, and Home & Farm Publishing Company, Appellees. Humphrey, Burnett & Humphrey and Helm, Bruce & Helm, their attorneys. } Notice.

Greeting:

You, and each of you, are hereby notified that in the Supreme Court of the United States, at its October term, beginning on Monday, the 12th day of October, 1903, and on the said 12th day of October, 1903, during motion hour, the appellant, in the above styled cause, will move the court to advance and submit the same pursuant to

the provisions of Rule XXXII of the said court, and you are hereby handed a copy of the appellant's brief to be used in the said court and filed on the said day.

The Louisville Trust Company, Receiver
of the Evening Post Company.
By Dodd and Dodd,
John L. Dodd,
Kohn, Baird & Spindle,
David W. Baird,
Its Attorneys.

We hereby acknowledge service of the above notice and receipt of a copy of the brief for appellant this September 19, 1903.

Alex. P. Humphrey,
James P. Helm,
Attorneys for Appellees.

Supreme Court of the United States.

OCTOBER TERM, 1903.

The Louisville Trust Company, Receiver of the Evening Post Company, Appellant, vs. Stuart R. Knott, et al., Appellees.	No. 389.

Motion to Advance and Submit under Rule 32.

Now comes the appellant, The Louisville Trust Company, as receiver of the Evening Post Company, by John L. Dodd, Esq., and David W. Baird, Esq., its attorneys of record, and files written notice to the appellees, the service of which was accepted, in writing, on September 19, 1903, by Alex. P. Humphrey, Esq., and James P. Helm, Esq., their attorneys of record, and pursuant thereto moves the court to advance and submit this cause accordingly as authorized by the provisions of Rule 32 of this court, having heretofore filed with the clerk of this court twenty-five copies of a printed brief for the appellant.

John L. Dodd,
David W. Baird,
Attorneys for Appellant.

Supreme Court of the United States

OCTOBER TERM, 1903.

THE LOUISVILLE TRUST COMPANY, RECEIVER OF THE EVENING POST COMPANY, - - - - - *Appellant*,

vs. No. 389.

STUART R. KNOTT et al., - - - - - - - - *Appellees.*

BRIEF FOR APPELLANT.

The only question in issue on this appeal is a question of the jurisdiction of the court below over the administration and settlement of the trust estate of the Evening Post Company.

Two suits were instituted by beneficiaries to settle the same trust estate, in courts of concurrent jurisdiction sitting in the same city and county, and in each of which a different receiver was appointed to take charge of the same property.

The State Court suit was instituted May 12, 1903, and the Federal Court suit was instituted May 27, 1903. The appellant is the receiver appointed by the State Court, and the appellees are the parties to the Federal Court suit and the receiver therein appointed.

STATEMENT.

The Evening Post Company is a Kentucky corporation, with a capital stock of $60,000, divided into 600 shares of the par value of $100.00 each. By the terms of its charter its corporate life began May 1, 1878, and was limited to twenty-five years, terminating May 1, 1903.

By the general law of Kentucky it is provided, as follows:

> "When any corporation expires by the terms of the articles of incorporation, or by the voluntary act of its stockholders, it may thereafter continue to act for the purpose of closing up its business, but for no other purpose; and it shall be the duty of the officers to settle up its affairs and business as speedily as possible; and they shall cause notice to be published, for at least once a week for four consecutive weeks, in some newspaper printed and published in the county, if any, of the fact that it is closing up its business; and all debts and demands against the corporation shall be paid in full before the officers receive anything." (Section 561, Ky. Statutes.)

On April 30, 1903, all of the officers and stockholders of the Evening Post Company assembled together and adopted the following resolutions, appointing the Columbia Finance & Trust Company of Louisville, as trustee, to liquidate, wind up and settle the affairs of the said expiring corporation, to-wit:

"BE IT RESOLVED:

> "(1) That the Columbia Finance & Trust Company be and it is hereby appointed liquidator of the affairs of the corporation, with directions to operate

for the use of the stockholders the affairs and business of said corporation as they have been operated until the property can be properly advertised and sold and the possession thereof delivered to the purchaser.

"(2) That prior to the said sale liquidator shall cause to be made for the use of the stockholders a comprehensive statement of the assets and liabilities of the corporation, and furnish each stockholder with a copy of said statement.

"(3) That the said liquidator shall in its advertisement specify the nature of the articles to be sold, and shall make such sale for cash to be paid on the delivery of possession, and shall require of the purchaser that he deposit a certified check for an amount equal to one-third of the total purchase price which the liquidator shall hold and credit upon the purchase price when the sale is consummated, or if for any reason it shall be set aside, return to the bidder. If said bidder to whom the property is knocked down shall fail at once to deliver to the liquidator the certified check as herein provided, the liquidator shall immediately re-sell the property and refuse to receive bids from said former bidder.

"(4) Said liquidator may, in his discretion, employ an auctioneer or other agents necessary or proper to be used in the sale of the property.

"(5) Until said sale, and during the operation of said property, said liquidator is given full authority and permission to employ such agents and persons as may be necessary to properly, conveniently and economically operate the company, and keep an account of all its expenses and take vouchers therefor. And after the property has been fully administered it shall make out a comprehensive account of its actings and doings, and shall furnish a copy thereof to each of the stockholders.

"(6) The said liquidator shall, from the proceeds of the sale of the property, pay all the debts of the corporation, and the balance, if any, shall be distributed among the stockholders according to their legal rights." (Pr. Rec. pp. 2-3).

This plan was thus adopted in lieu of the said statutory method, to enable the said officers to bid on and buy in the said property.

On the same date the said Columbia Finance & Trust Company accepted the said trust and entered upon its execution.

The estate of W. N. Haldeman, deceased, was the owner of 48 shares of the capital stock of the Evening Post Company. Bruce Haldeman, Bennett H. Young and Elizabeth Haldeman, as executors and executrix of his will, desired to inquire into and ascertain the financial condition of the said Evening Post Company, to enable them to form some estimate of the intrinsic value of its stock, and, to that end, duly made application to inspect its books, papers and affairs, which was peremptorily refused.

On May 12, 1903, the said personal representatives filed their complaint in equity in the Jefferson Circuit Court of Kentucky against the said trustee and the said Evening Post Company, its creditors and stockholders, so far as then known to them, wherein they set forth the terms of the said trust and the denial of their rights as stockholders, and claimed that a necessity had arisen for the administration and liquidation of the said trust estate in a court of equity where the assets and liabilities could be properly ascertained, administered, marshaled and sold, and a fair,

just and proper accounting and settlement could be had. (Pr. Rec. pp. 25-31).

The prayer of the said complaint reads as follows:

"WHEREFORE, the premises considered, the plaintiffs pray for a settlement of the accounts of the Evening Post Company, and of the Columbia Finance & Trust Company as liquidator thereof herein, and that this cause be referred to the commissioner of this court to audit, state and settle the accounts of the Columbia Finance & Trust Company, as trustee or liquidator of the affairs and business of the said Evening Post Company; that a full, true and correct accounting of the business and affairs of the said Evening Post Company, and of the liabilities against the same, be ascertained and reported, and the assets sold and disposed of and distributed amongst the parties thereto according to their respective interests.

"Plaintiffs further pray that pending this action, and until the final liquidation of the affairs of the Evening Post Company and the sale of its plant and assets, that the court herein determine as to whether or not the affairs of the said Evening Post Company should be continued in operation, and, if so, that the operation of the said plant be conducted under and subject to the orders of the court herein.

"And the plaintiffs further pray that a mandatory preliminary order be entered herein commanding and directing the defendants, and each of them, to allow the plaintiffs reasonable access to and an examination of the books, papers, documents and affairs of the said Evening Post Company, including all documentary information in connection therewith which is in the possession of the defendants or any of them.

"And the plaintiffs further pray for their costs herein expended, and for all such proper and equitable

relief, as the nature of the case may demand." (Pr. Rec. p. 30).

Process was forthwith issued and served on all of the defendants. On May 19, 1902, the plaintiffs in that suit, pursuant to their said prayer, moved the court for a preliminary order, commanding and directing the defendants, and each of them, to allow the said plaintiffs reasonable access to and an inspection of the books, records and documents of the said Evening Post Company touching its assets, liabilities and business affairs, to which motion all of the defendants appeared and objected, and the same was assigned for hearing to May 23, 1903. (Pr. Rec. 31).

On May 23, 1903, all of the defendants demurred to the said complaint and also filed answers to the same. (Pr. Rec. pp. 32-38.) They made no objection to the jurisdiction of the said State Court, but, on the contrary, expressly submitted themselves to the said jurisdiction, as is evidenced by the following extract from the answer of the said trustee:

> "The defendant says it submits itself to the jurisdiction of the court, and will of course promptly obey all orders of the court." (Pr. Rec. p. 38).

The hearing of this motion was commenced Saturday, May 23, 1903, and, there not being time to complete the same on that day, the further hearing was adjourned to May 25, 1903, and, there still not being time to complete the hearing on that date, another adjournment was had until May 30, 1903, when the hearing thereof was completed and it was submitted. Thereafter, on June 4, 1903,

an elaborate opinion was filed by the chancellor of the state court sustaining the said motion. (Pr. Rec. pp. 38-47.)

While the said hearing was in progress, and just before its completion, on May 26, 1903, the appellee, Stuart R. Knott, filed his suit at law, in the United States Circuit Court for the Western District of Kentucky, against the said Evening Post Company demanding judgment for $6,000.00 in debt with interest thereon from April 30, 1903. To this suit the said Evening Post Company forthwith entered its appearance and consented that judgment might be immediately entered, which was accordingly done. (Pr. Rec. pp. 23-24).

On the next day, May 27, 1903, the said appellee, Stuart R. Knott, as such judgment creditor, filed this suit, in the nature of a creditor's bill, against the same trust estate and defendants as in the aforesaid state court, but he entirely ignored the pendency of the said state court case. The prayer of his bill reads as follows:

> "The premises considered, the complainant prays: That this court will at once appoint a receiver herein and direct the parties hereto to deliver into his hands all the rights, properties, franchises, books of accounts, records, documents, choses in action and all other things now or lately belonging or appertaining to the Evening Post Company, and whether in the hands of the said Evening Post Company, or of the said Columbia Finance & Trust Company, or the said R. W. Knott, B. G. Boyle or E. Q. Knott; that the said receiver be directed forthwith to report to this court what such property is and what arrangement can be made for the continued publication of said paper until a decree can be entered directing a sale herein; that

this court ascertain what debts are due by the said Evening Post Company, by reference to a commissioner or other proper proceeding; that it will apply to the payment of the said debts the property of the said Evening Post Company in the just order of priorities, if priorities there be, and will provide for costs and expenses of this suit; that all other and proper equitable relief may be had looking to the administration of the estate of the said Evening Post Company and the payment of its just debts; and to that end, the sale of its property and the bringing of money produced by such sale into the registry of the court for distribution among the creditors." (Pr. Rec. p. 5.)

Simultaneously with the filing of the said bill a motion was made by the said complainant to appoint a receiver, and an order of injunction was forthwith entered by the lower court, without bond, reading as follows:

"Pending the hearing of said motion, it is ordered by the court that the said Columbia Finance & Trust Company be and it is restrained from disposing of any part of said property and from delivering possession of any part thereof to any person or officer otherwise than in such manner as may be approved by this court." (Pr. Rec. p. 8).

All of the defendants to the said bill promptly entered their appearances and filed answers consenting to the appointment of a receiver of the property and assets of the Evening Post Company as prayed. (Pr. Rec. pp. 9-10).

On the next day, May 28, 1903, the said court appointed the appellee, Lewis C. Humphrey, receiver. (Pr. Rec. p. 8).

It would be difficult to conceive of a more speedy pro-

ceeding to anticipate and circumvent the orderly process of the state court than the action aforesaid.

The plaintiffs, in the state court proceeding, had no notice whatever of the said litigation until after the said receiver had been appointed and qualified. The defendants, in the state court proceeding, thereafter promptly interposed the said federal court receivership and possession of the said trust estate as an excuse for their disobedience of the order of the state court. (Pr. Rec. p. 48).

The state court, maintaining that its jurisdiction to administer and settle the said trust estate first attached, appointed the appellant Louisville Trust Company as its receiver, and directed it to take possession and charge of the said entire trust estate. (Pr. Rec. pp. 52-53).

When it was, thereafter, made to appear to the said state court that the appellees refused to obey its order, because of the said federal court receivership, it entered the following order directing the appellant to intervene in said federal court suit and claim the said trust estate:

> "It now appearing to the court that more than two weeks subsequent to the institution of this suit to settle the trust estate of the Evening Post Company, therein described, and after all the defendants had answered expressly submitting themselves to the jurisdiction of this court, certain proceedings were instituted in the United States Circuit Court for the Western District of Kentucky against the said Evening Post Company, et al., for the settlement of the same trust estate herein involved, which were instituted in the name of Stuart R. Knott, against the said Evening Post Company and others, wherein the proceedings in this action were ignored, and wherein, without notice to plaintiffs, a receiver was appointed to take charge

of the same trust estate herein involved, and this court being of the opinion that its jurisdiction to administer, settle and liquidate the said trust estate first attached, and that to enable it to grant the relief sought by plaintiffs herein, it is necessary to assume the possession and control of all of the property belonging to the said Evening Post Company described in the petition, therefore, in conformity with that spirit of comity which exists between state and federal courts of concurrent jurisdiction, and in order that there may be no unseemly conflict, it is now ordered that the said Louisville Trust Company, receiver of the said Evening Post Company and its property, under the order of appointment in this case, do intervene in said case of Stuart R. Knott *versus* Evening Post Company, et al., pending in the said federal court, and there claim the said trust estate for administration and settlement in this suit, and test and contest the question of the prior jurisdiction of this court over the subject matter in such manner and form as it may be advised by its counsel." (Pr. Rec. p. 59).

Pursuant to the said directions the Louisville Trust Company, as receiver, filed its intervening petition in this case, claiming the right to the custody and possession of the said trust estate, and moved the lower court to vacate the order appointing its receiver, and to direct the said receiver to deliver, turn over and surrender to the said Louisville Trust Company, as receiver of the said state court, all of the assets and property of the Evening Post Company in his custody, possession and control, including the books, papers and documents pertaining to its business and affairs. (Pr. Rec. pp. 13-23).

The lower court allowed the said petition to be filed,

but subsequently overruled the said motion and at the same time dismissed the said petition. (Pr. Rec. p. 63).

In the said intervening petition it is averred that the federal court suit was instituted at the instance and request and by the procurement of the defendants to the then pending state court suit *for the express purpose of ousting the said state court of its previously acquired jurisdiction*, and that it was railroaded through, without notice to the plaintiffs in the said state court suit, in order to defeat the objects thereof. It is alleged therein, among other things, as follows:

> "That to enable the said state court to grant any of the relief sought in the said state court suit it became absolutely necessary and indispensable that the said state court should take and assume actual possession of the said trust estate of the said Evening Post Company and to administer, marshal and liquidate the same according to the prayer of the petition in the said state court." (Pr. Rec. p. 21).

It is therein further alleged:

> "That the said Jefferson Circuit Court, Chancery Branch, First Division, is a court of equity of concurrent jurisdiction with this court, and that the sole and entire purpose of the complainant, and defendants in the institution and prosecution of this suit, was and is to oust the said Jefferson Circuit Court, Chancery Branch, First Division, of its lawful jurisdiction, and to divest it of the lawful custody of the property and estate of the said Evening Post Company, and that the subject matter of controversy in the said cause in the state court is identical with the subject matter of controversy in this suit; that if this court, through its

receiver aforesaid, continues in the custody, possession and control of the said estate of the Evening Post Company the effect thereof will be to supersede and deprive the said Jefferson Circuit Court, Chancery Branch, First Division aforesaid, of its right to proceed, try and determine the cause of action therein asserted, involving identically the same subject matter and the administration and liquidation of identically the same trust estate between the same parties." (Pr. Rec. p. 22).

None of these allegations were denied by any of the appellees. The prayer of the said intervening petition reads as follows:

"Wherefore, your petitioner prays permission to file the foregoing pleading in obedience to the express directions of said state court, and that this court enter an order vacating its order appointing Lewis C. Humphrey, receiver, and directing the said Lewis C. Humphrey to turn over, surrender and deliver to your petitioner all of the estate and properties of the said Evening Post Company of every kind, character and description, including its books, papers, accounts and documents pertaining to its business, to the end that the said trust estate shall be administered, closed and wound up by the said Jefferson Circuit Court, Chancery Branch, First Division, in manner and form as required by law; and to the further end that, so far as the said trust estate is concerned, further proceedings in this suit shall be stayed, suspended and abated and the hands of this court held in abeyance until the said state court, first obtaining jurisdiction, has terminated the case pending before it. Your petitioner prays for its costs herein expended, and for all such proper and equitable relief, both general and special, as the nature of the case may demand." (Pr. Rec. p. 22-23.)

The court below overruled appellant's motion for possession and at the same time absolutely dismissed the said intervening petition on the ground that its jurisdiction superseded and terminated the right of the plaintiffs in the said state court suit to further prosecute the same.

II.

ERRORS ASSIGNED AND RELIED ON.

The following is the assignment of errors filed by the appellant in the lower court:

I.

"The said Circuit Court of the United States for the Western District of Kentucky erred in deciding that its jurisdiction over the estate of the said Evening Post Company is prior to and exclusive of the previously acquired jurisdiction thereof of the Jefferson Circuit Court, Chancery Branch, First Division.

II.

"The said court erred in denying the motion of the Louisville Trust Company, receiver, to compel Lewis C. Humphrey, receiver of this court, to turn over to it the estate of the said Evening Post Company in his custody and possession.

III.

"The said court erred in denying the motion of the said Louisville Trust Company, receiver, to vacate the order appointing Lewis C. Humphrey receiver of the said Evening Post Company.

IV.

"The said court erred in retaining jurisdiction of the subject matter of the estate of the said Evening Post Company, and especially of its estate, books, papers and assets and documents to the exclusion of the previously acquired jurisdiction of the Jefferson Circuit Court, Chancery Branch, First Division, of the State of Kentucky.

V.

"The said court erred in dismissing the intervening petition of the said Louisville Trust Company, receiver, and adjudging the costs incurred therein in favor of the complainant, Stuart R. Knott, herein.

VI.

"The said court erred in refusing to grant the relief accordingly as prayed and moved for by the Louisville Trust Company, receiver of the Evening Post Company, under appointment of the Jefferson Circuit Court, Chancery Branch, First Division." (Pr. Rec. pp. 82-83).

Tersely stated, the appellant's contention, under these specifications, is, that where there are two suits pending in different courts of concurrent jurisdiction which involve and affect the same subject matter, and where the jurisdiction of neither is complete or effectual unless it can exercise exclusive jurisdiction over the entire subject matter, then the jurisdiction of that court whose interposition is first invoked is exclusive of the other; and that this rule is not limited, in its application, to cases where the subject

matter has been actually seized under judicial process before the second suit is begun, but applies to all suits brought to administer trusts and to liquidate, settle and distribute insolvent estates, during the progress of which and to afford the relief prayed, the court may be compelled to assume the possession and control of the entire trust estate.

III.

ARGUMENT.

We claim that the Federal Circuit Court, sitting at Louisville in the Western District of Kentucky, has no supervisory or revisory power over suits properly instituted and pending in a state circuit court of concurrent jurisdiction over the same territory.

Section 720 of the U. S. Rev. Statutes reads as follows:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

In Haines vs. Carpenter, 91 U. S., 254, 257, this court said:

> "The great object of the suit is to enjoin and stop litigation in the state courts and to bring all the litigated questions before the circuit court. This is one of the things which the federal courts are expressly prohibited from doing. . . . The state courts have full and ample jurisdiction, and no suffi-

cient reason appears for interfering with their proceedings."

In Sargent vs. Helton, 115 U. S., 350, this court said:

> "The sole purpose of the bill in this case was to restrain the execution of an order of the Circuit Court for the County of Escambia, a court of the State of Alabama, and no relief which, upon the averments of the bill, this court could grant would be effectual without the writ of injunction prayed for."

In Taylor vs. Carryl, 20 How., at page 595, this court said:

> "It forms a recognized portion of the duty of this court to give preference to such principles and methods of procedure as shall serve to conciliate the distinct and independent tribunals of the States and of the Union so that they may co-operate as harmonious members of a judicial system co-extensive with the United States, and submitting to the paramount authority of the same constitution, laws and federal obligations. The decisions of this court that disclose such an aim, and that embody the principles and modes of administration to accomplish it, have gone from the court with authority, and have returned to it, bringing the vigor and strength that is always imparted to magistrates, of whatever class, by the approbation and confidence of those submitted to their government."

In Wiswall vs. Sampson, 14 How., 65, and In Re Tyler, 149 U. S., 181, this court said:

> "When a receiver has been appointed, his possession is that of the court, and any attempt to disturb it, without the leave of the court first obtained, will be a contempt on the part of the person making it."

In Peck vs. Jenness, 7 How., 624, this court stated the rule to be as follows:

> "It is a doctrine of law too long established to require a citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the case, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right can not be arrested or taken away by proceedings in another court. These rules have their foundation not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction and thus the parties be without remedy, being liable to a process for contempt in one, if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin or any other process, for this would produce a conflict extremely enbarrassing to the administration of justice."

The cases of:

Orton vs. Smith, 18 How., 266.
Freeman vs. Howe, 24 How., 450.
Buck vs. Colbath, 3 Wall., 334.
Covell vs. Hyman, 111 U. S., 182-3.
Gumbel vs. Pitken, 124 U. S., 143.
Moran vs. Sturges, 154 U. S., 256.
Central Bank vs. Stevens, 169 U. S., 432.
Shields vs. Coleman, 157 U. S., 178, 182.
Harkrader vs. Wadley, 172 U. S., 148.
Farmers Loan Co. vs. Lake St. Rd. Co., 177 U. S., 61,

among many others, reiterate and apply the above salutary rule.

In Harkrader vs. Wadley, *supra*, the rule is stated in this language:

> "Where a state court and a court of the United States may each take jurisdiction of the matter, the tribunal where jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed and the jurisdiction involved is exhausted; and this rule applies alike in both civil and criminal cases."

In Merritt vs. American Steel-Barge Co., 79 Fed. Rep., 231, 24 C. C. A., 530, the Court of Appeals for the Eighth Circuit, after stating the rule as above, said:

> "The doctrine in question is not limited in its application to cases where property has actually been seized under judicial process before a second suit is instituted in another court, but it applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in all other suits of a similar nature, where in the progress of the litigation, the court may be compelled to assume the possession and control of specific personal or real property. In cases of the latter kind, the rule is that the tribunal which first acquires jurisdiction of the cause by the issuance and service of process is entitled to retain it to the end, without interference or hindrance on the part of any other court. And this rule, in its application to federal and state courts, being the outgrowth of necessity, is a principle of right and of law which leaves nothing to the discretion of a court, and may not be varied to suit the convenience of litigants."

In Farmers Loan Co. vs. Lake St. Rd. Co., 177 U. S., 61, this court, while discussing and applying this principle, said:

> "This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons. Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected."

In Heidritter vs. Oil-Cloth Co., 112 U. S., 294, 305, this court through Mr. Justice Matthews, in speaking of the principle for which we are contending, said:

> "It is merely an application of the familiar and necessary rule, so often applied, which governs the relation of courts of concurrent jurisdiction, where it concerns those of a state and of the United States, constituted by the authority of distinct governments, though exercising jurisdiction over the same territory. That rule has no reference to the supremacy of one tribunal over the other, nor to the superiority in rank of the respective claims, in behalf of which the conflicting jurisdictions are invoked. It simply requires, as a matter of necessity, and, therefore, of comity, that when the object of the action requires control and dominion of the property involved in the litigation, that court which first acquires possession,

or that dominion which is equivalent, draws to itself the exclusive right to dispose of it, for the purposes of its jurisdiction."

In the case of Adams vs. Mercantile Trust Company, 66 Fed. Rep., 621, 30 U. S. App., 204, 15 C. C. A., 1, this principle was applied, and the court held that a federal court may, in comity, surrender property to the receiver of a state court, saying:

> "We are of the opinion that the court below erred in not granting the application of the receiver of the state court for the possession of the property which is so clearly necessary for the further exercise of that court's jurisdiction, and to which possession it is so clearly entitled."

In Hatch vs. Bancroft, 67 Fed. Rep., 807-8, the court after reviewing the authorities, said:

> "The authorities requiring the observance of the rule of comity universally obtaining between courts of concurrent jurisdiction, and forbidding this court to interfere under such circumstances, are numerous. Judd vs. Telegraph Co., 31 Fed. Rep., 182 (and numerous other citations).
>
> "In the last case a motion was made for a receiver and injunction *pendente lite* by a creditor in the federal court who sought to get in the assets and distribute the property of an insolvent corporation among its creditors where suits had already been brought in the state court by other creditors to obtain the same relief. The bill also contained allegations of grave irregularities and proceedings in the state court, which were evidently advanced to sustain the application for the interference of the federal court. Judge Wallace

applied the rule that the state court, having first taken cognizance of the controversy, was entitled to retain jurisdiction to the end of the litigation, and to take possession and control of the subject matter of the investigation, to the exclusion of all interference of other courts of co-ordinate jurisdiction.

"It is manifest from these authorities that until the proceedings in the suit pending in the state court have come to an end, and the property in controversy is no longer in the possession of that court, this court is powerless to afford complainant relief. The conditions require that this court should stay its hand, and leave the complainant free to pursue his remedy in the state court, by intervening in that suit for the assertion and protection of his rights, or to permit him to await here the result of that litigation, and take such further proceedings as may be shown to be necessary and permissible. In order that the complainant's right to redress may not be defeated, he may have leave to dismiss his bill without prejudice so that he may safely intervene in the state court.

"As it is not questioned that the proceedings pleaded in behalf of defendants are still pending in the state court and as the doors of that tribunal are open to all judgment creditors alike, in view of the considerations stated, and of the further fact that many of the interrogatories call for the contents of books and papers which the defendants could be compelled to produce at the instance of complainant, unless such books and papers are in the custody of the state court, as presumably they are, it is an additional ground for our conclusion."

In Powers vs. Blue Grass Building Association, 86 Fed. Rep., 705, 709, Judge Lurton held that if the relief sought involves dominion over the same subject matter, and can

not be effectually granted if dominion over the same be taken by process from the federal court, it is a case where the latter should regard the jurisdiction of the former as exclusive and hold its hands until the court first obtaining jurisdiction has terminated its case, saying:

> "This court could not, with proper respect to itself and for the state court, retain it for the purpose of interpreting the deed, or adjudging the rights of creditors or shareholders thereunder. That subject is within the exclusive jurisdiction of the state court."

And further holding, as we interpret it:

> "Where there are two suits pending in different courts of concurrent jurisdiction, which involve and affect the same subject matter, and where the jurisdiction of neither is complete nor effectual unless it may, if necessary or proper, exercise exclusive jurisdiction of the *res* in litigation, the jurisdiction of the first is exclusive of the second. The old managers (officers named in Section 561, Ky. Stats.) in abdicating their trust as they did when they made the illegal assignment to Clay (in that case but in this case when they made the legal assignment to the Trust Company) have forfeited the confidence of their constituents and should not be restored to power."

We might multiply authorities in support of this question, but deem it unnecessary.

It is quite obvious that the suit filed in the state court on May 12, 1903, and the suit filed in the federal court on May 27, 1903, involve the administration and settlement of the same trust estate between the same parties, and that the relief sought in both can not be granted without a manifest conflict. It is equally obvious, from confessedly

true allegations of the intervening petition of the appellant, that the federal court proceeding complained of was a collusive one, resorted to by the defendants in the state court proceeding for the sole purpose of superseding and defeating the objects of the state court suit.

The resolutions of the stockholders of the Evening Post Company, adopted April 30, 1903, were, in effect, a deed of assignment of all of the property and effects of the Evening Post Company to the Columbia Finance & Trust Company in trust for the payment of the obligations existing against the said Evening Post Company according to their respective priorities. They amounted to an abdication by the officers and stockholders of the Evening Post Company of any further right to control, dispose of and distribute the same to the parties entitled thereto. The trustee, therein named, accepted the said trust and expressly submitted itself to the jurisdiction of the state court. The plaintiffs in the state court suit are beneficiaries expressly provided for in the said trust instrument and as such had the right to institute and prosecute the said state court suit.

The learned chancellor of the state court held that a good cause of action for the relief prayed was set forth in the said state court petition. In the course of his opinion the chancellor of the state court said:

> "This action to settle this trust is not unusual or extraordinary in any respect; on the contrary, it is the usual every-day remedy applied by the courts in cases of this general character. . . . In the case at bar we have a suit in equity over the settlement of an estate held in trust, and the inspection of the books is asked only as relief ancillary to that cause of action." (Pr. Rec. pp. 43, 47).

It was beyond the power of the federal court below to supervise, review and reverse this decision. It had no power to inquire into and determine that the prayer of the petition in the state court went beyond the averments contained in the body of the petition. It exceeded its coordinate authority when it held, in effect, that the state court erred in appointing the appellant as receiver, and also in denying to the appellant the custody of the property committed to it by the state court.

The lower court disregarded the following often reiterated rule of this court:

> "Where a court (of a state) has jurisdiction it has a right to decide every question which occurs in the cause, *and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right can not be arrested or taken away by proceedings in another court.*" (7 How., 624-5.) (Our Italics.)

The judgment, now complained of, does arrest and take away from the state court the right to further proceed and grant any of the relief therein sought. All of the assets of the said Evening Post Company, including its books, papers, etc., are now in the actual possession and control of the United States Circuit Court for the Western District of Kentucky. It has denied the power or right of the state court to any control or jurisdiction over any part thereof. Its judgment (if allowed to stand) as effectually enjoins the said state court from any further exercise of its jurisdic-

tion to grant any of the relief therein sought as a positive writ of prohibition could possibly do. If it were to undertake to enforce obedience to any of its orders or judgments through its duly constituted officers they would be guilty of contempt to the lower court, whose receiver is in the possession of all of the assets, including the books, papers and affairs of the said Evening Post Company, and the other individual and corporate defendants to the said state court suit have asserted the said judicial possession as an excuse for their disobedience of the orderly process of the state court.

In view of this distressingly delicate and embarrassing conflict of jurisdiction the state court properly adopted and followed the analogous precedent approved by this court in Shields v. Coleman, 157 U. S., 168, 182, and ordered and instructed its receiver to intervene in its behalf herein, and to assert and maintain its exclusive right to the custody, administration and settlement of the said trust estate. The appellant obeyed the said instructions and the lower court allowed its petition to be filed, and, with every material allegation thereof confessed to be true, it denied appellant's motion to vacate the order or to compel its receiver to surrender possession of any part of the said subject-matter, and absolutely dismissed its petition. It delivered a very elaborate opinion in support of its said ruling (Pr. Rec. pp. 64 to 80). When this opinion is reduced to its final analysis we believe it will be seen that the said learned Judge reached the following conclusions, to-wit:

1. That the proceedings of the state court are inquirable into and reviewable in the said federal court.

2. That the scope of the petition in the state court had been improperly interpreted by that court, and that it was limited to the claim made to examine the books, etc., and could not be broadened by the prayer into a trust settlement suit. (Pr. Rec. p. 70.)

3. That the liquidating resolutions of April 30, 1903, and the acceptance thereof by the liquidating agent named, did not create a trust in behalf of any of the stockholders. This conclusion was reached in spite of the sixth clause of the said resolutions, reading as follows:

> "The said liquidator shall, from the proceeds of the sale of the property, pay all of the debts of the corporation, and the balance, if any, shall be distributed among the stockholders according to their legal rights."

And also the first clause thereof, to wit:

> "That the Columbia Finance & Trust Company be and it is hereby appointed liquidator of the affairs of the corporation, with directions to operate for the use of the stockholders the affairs and business of said corporation as they have been operated until the property can be properly advertised and sold, and the possession thereof delivered to the purchaser." (Pr. Rec., pp. 2-3.)

4. That all of the decisions of this and inferior federal courts tending to sustain the contention of appellant are mere *dicta*, and not binding on it.

5. That "The mere priority of commencement of litigation is not, but the priority of judicial seizure is, the test of jurisdiction over the *res* in all cases where property is the subject of contention. This test is

simple, direct and practical, and draws a line which is palpable. It is of easy solution and can not be open to serious mistake. Whenever suits are pending in two or more courts of concurrent powers, in each of which, at the instance of different plaintiffs, it is sought to control or to subject to the demands of creditors, the same property, that court alone has the right to do so which first gets the property within its grasp by some recognized mode of judicial seizure, and that, too, without regard to the question which suit was first instituted." (Pr. Rec., p. 78.)

6. That it is always open to a federal court, at the instance of one of its judgment creditors, to judicially seize the property of the debtor corporation, whether the said property be then in course of administration in a state court or not.

7. That having thus first actually seized such property, and placed the same into the hands of a receiver of its own appointment, it will continue to hold and administer the same in spite of the fact that a previously instituted suit in a state court of concurrent jurisdiction was then pending against the trust property seeking to subject it to the payment of all demands against it, including the demand of the said federal court creditor.

We claim that the said conclusions and each of them are erroneous. In the first place the lower court ignored Section 90 of the Civil Code of Practice of Kentucky, constituting part of the statute law of that state. This section reads as follows:

"The petition must state facts which constitute a cause of action in favor of the plaintiff against the

> defendant, and must demand the specific relief to which the plaintiff considers himself entitled; and may contain a general prayer for any other relief to which the plaintiff may appear to be entitled. If no defense be made, the plaintiff can not have judgment for any relief not specifically demanded; *but if defense be made he may have judgment for other relief, under a prayer therefor.*" (Our Italics.)

All of the defendants answered the state court suit before any suit was filed in the federal court. The prayer of the petition, as decided by the state court, was amply justified by the averments contained in the body thereof. We insist that the lower co-ordinate court had no power to review or reverse that ruling.

In the second place the established principle respecting comity between courts of concurrent jurisdiction in the same territory is, as repeatedly stated in the decisions of this court and other inferior federal courts, as follows:

> "The case is one for the application of the rule that the court which first takes cognizance of *the controversy* is entitled to retain jurisdiction to the end of the litigation, and to take possession and control of the subject-matter of the investigation to the exclusion of all interference of other courts of co-ordinate jurisdiction." (Judd v. Tel. Co., 31 Fed. Rep., 183.)

It is stated by this court in Farmers' Loan Co. v. Lake St. Rd. Co., 177 U. S. 61, as follows:

> "This rule is not restricted in its application to cases where property has been *actually* seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits

are brought to enforce liens against specific property, to marshal assets, administer trusts or liquidate insolvent estates, and in suits of a similar nature, *where, in the progress of the litigation the court may be compelled to assume the possession and control of the property to be affected.*" (Our Italics.)

There can be no doubt but that the entire property and estate of the said Evening Post Company was involved in and affected by the state court suit.

If the rule were not as thus stated a federal court of concurrent jurisdiction with a state court could, at any time, interpose and stop the entire judicial machinery, in any state court suit, regardless of when the latter suit was begun. This statement is forcibly illustrated by the case at bar. The state court had acquired full jurisdiction over the subject-matter, as well as the parties, on May 12, 1903. All of the defendants had been served, had entered their appearances and had actually answered, expressly submitting themselves to the jurisdiction of that court. The state court had actually been engaged two days in the trial of preliminary and ancillary motions respecting the said subject-matter. During the progress of this trial, and in order to anticipate and defeat the objects thereof, the appellees secretly rushed into the federal court and collusively caused a judgment at law to be there entered *instanter*, and a bill in equity to be filed thereon and a receiver appointed to take charge of identically the same subject-matter as was then already involved in the state court. It is alleged in the intervening petition, and it is nowhere denied, that this federal court scheme was resorted to at the instance and request and by the procure-

ment of the defendants in the state court suit "for the express purpose of ousting the said state court from its previously acquired jurisdiction." (Rec., 19.)

It is further therein alleged, and admitted, for the purposes of this hearing, to be true, as follows:

> "That if this court, through its receiver aforesaid, continues in the custody, possession and control of the said estate of the Evening Post Company the effect thereof will be to supersede and deprive the said Jefferson Circuit Court, Chancery Branch, First Division, aforesaid, of its right to proceed, try and determine the cause of action therein asserted involving identically the same subject-matter and the administration and liquidation of identically the same trust estate between the same parties." (Rec., 22.)

In the third place it is not the law that a federal court of concurrent jurisdiction with a state court has any revisory power over orders and judgments entered by the said state court. As already shown this court has repeatedly held that:

> "Whether its (state court) decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court."

We feel that we should not conclude this brief without adverting to some particular averments of the bill herein, and features of the case and the action of the defendants in relation thereto.

The record shows that every stockholder of the Evening Post Company was made a party to and appeared in the state court suit before any of the federal court pro-

ceedings were inaugurated. The only stockholders, not made parties to this bill herein, are the plaintiffs in the state court suit, and J. M. Atherton and Laura G. Boyle. The record shows that B. G. Boyle, the husband of the said Laura G. Boyle, is named as a defendant to the bill herein, and he at once, upon the filing thereof, entered his appearance and consented to the granting of the relief prayed, and that the said J. M. Atherton was present and signed the bond of the federal court receiver as surety, and became one of his lessees of the said entire trust property. Hence we are warranted in the statement that the only stockholders, not in effect parties to the said federal court proceeding, were the plaintiffs in the said state court suit. All creditors, so far as then known, were in like manner brought before the state court, but none were named as parties to the federal court bill other than complainant.

In the face of these facts it is quite extraordinary that the bill should aver that three different theories are advanced by the stockholders in reference to the property of the said Evening Post Company as it existed upon the day its charter life expired (May 1, 1903), to wit:

> "(a) That by virtue of the statute it continued in existence with capacity to sue and be sued."
>
> "(b) That by virtue of the statute all of its assets vested in its officers in trust to dispose of the same, and out of the proceeds of the sale thereof to pay the creditors.
>
> "(c) That by virtue of the resolutions of the stockholders at their meeting of April 30, 1903, all said assets have vested in the defendant, the Columbia Finance & Trust Company, as liquidator, whose duty

it is to dispose of the said assets and out of the proceeds to pay the debts." (Rec., 3-4.)

And then follows this allegation, to wit:

"That the stockholders of the said defendant, Evening Post Company, are at variance among themselves and such disputes are likely to produce such action as will greatly injure the property of the Evening Post Company and make it of much less value than the amount of its debts." (Rec., 4.)

In view of these allegations it would have been naturally supposed that some stockholder asserting some particular one of these conflicting theories to the exclusion of the others would have been named as a defendant. Such was not, however, the case. This record satisfactorily demonstrates that whatever might have been the variances of views that existed between the stockholders prior to April 30, 1902, they were all adjusted and settled by the resolutions then adopted, and that trust is fully set out in the said bill. All of the stockholders, except the plaintiffs in the state court suit, voted for the said trust, and thereby estopped themselves from insisting upon any other theory. The plaintiffs in the state court suit accepted and ratified the plan set forth in the said resolutions, and predicated their cause of action thereon to enforce the terms of the trust therein created. They made and expressly named all of the other beneficiaries of the said trust, whether creditors or stockholders, so far as known to them, parties to the said suit.

The resolutions of April 30, 1903, when accepted by the trustee therein named, constituted a contract primarily for

the benefit of the creditors, and secondarily for the benefit of the stockholders. All were beneficiaries thereunder and interested therein.

The plaintiffs in the state court had the right to maintain their suit. Sections 428, 432 and 438 of the Civil Code of Kentucky confer such authority. They read as follows:

> "428. 1. Who may institute action. A representative, legatee, distributee or creditor of a deceased person may bring an action in equity for the settlement of his estate.
>
> "2. Who must be made parties. The representatives of the decedent and all persons having a lien upon or an interest in the property left by the decedent, or any part thereof, and the creditors of the decedent, so far as known to the plaintiff, must be parties to the action as plaintiffs or defendants."
>
> "432. A creditor appearing before the commissioner and presenting his claim becomes thereby a party to the action, and is concluded by the final judgment of the court allowing or rejecting his claim."
>
> "438. The foregoing provisions of this chapter shall, so far as applicable, regulate proceedings for the sale of property held in trust, by virtue of the provisions of article two, chapter forty-four, General Statutes (now article two, chapter fifty-four, Kentucky Statutes) or assigned by a debtor for the payment of debts generally; but sub-section two of section four hundred and twenty-eight shall not be so construed as to require all creditors holding liens upon the property by virtue of the statute, or under the deed of assignment, to be made parties."

The state court acquired complete jurisdiction over the trust estate, and the right to administer, liquidate, settle and distribute the same among the parties interested therein more than two weeks before the jurisdiction of the lower court was invoked.

We, therefore, conclude this argument by quoting from the opinion in the case of Rodgers v. Pitt, 96 Fed. Rep. 670, as follows:

> "The general rule is well settled that, where different courts have concurrent jurisdiction, the court which first acquired jurisdiction of the parties, the subject-matter, the specific thing, or the property in controversy, is entitled to retain the jurisdiction to the end of the litigation, without interference by any other court. This rule is important to the exercise of jurisdiction by the courts whose powers are liable to be exerted within the same spheres and over the same subjects and parties. There is but one safe road for all the courts to follow. By adhering to this rule, the comity of the courts, national and state, is maintained, the rights of the respective parties preserved, and the ends of justice secured, and all unnecessary conflicts avoided. Any other rule would be liable at any time to lead to confusion, if not open collision, between the courts, which might bring about injurious and calamitous results. This rule is elementary law, and a citation of all the authorities in its support would be endless and useless."

We respectfully ask that this rule be followed in this case, and that the decree holding that the lower court had jurisdiction to administer the said estate, exclusive of the

state court, and dismissing the appellants' intervening petition be reversed, with appropriate directions for further proceedings.

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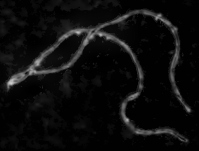

Supreme Court [illegible]

[illegible]

LOUISVILLE TRUST COMPANY, [illegible]

vs.

STUART R. KNOTT [illegible]

BRIEF FOR APPELLEES.

ALEXANDER P. HUMPHREY,
[illegible]

[illegible]

28439

Supreme Court of the United States.

OCTOBER TERM, 1903.

LOUISVILLE TRUST COMPANY, RECEIVER, . *Appellant*,

vs.

STUART R. KNOTT ET AL., *Appellee*.

This is an appeal prosecuted from the judgment of the Circuit Court of the United States for the Western District of Kentucky, dismissing the application of the appellant to have the properties and assets of the Evening Post Company, then in the custody of the Court's Receiver, Mr. Lewis C. Humphrey, turned over to the appellant, an appointee of the Jefferson Circuit Court.

FACTS.

We think it would conduce to a clear understanding of the questions if we should make a statement of facts out of which the controversy arose.

The Evening Post Company was a corporation created under the general incorporation law of Kentucky, having a charter which expired on the 1st day of May, 1903. A few days before this date it developed that forty-eight out of a total issue of six hundred shares of stock in this Company were held by the estate of Walter N. Haldeman. The executors of Haldeman's estate only a few days before the expiration of the charter produced that stock and had it transferred to their names. The Haldemans are the owners and controllers of the Courier-Journal and the Louisville Times, competitive papers of the Evening Post. When the Haldeman ownership became known it became evident that there could not be an amicable reorganization of the Evening Post Company. Thereupon a meeting of stockholders was called, and at that meeting every share of stock was represented. All of the stock except that held by the Haldemans was voted to appoint the Columbia Finance and Trust Company agent as liquidator, to wind up the affairs

of the corporation. The forty-eight shares controlled by the hostile interests objected to every move made, but the resolution appointing the Trust Company as liquidator was adopted, and the liquidator accepted the trust. The hostile stockholders also demanded the right to inspect the books, papers, accounts and all the private transactions of the Evening Post Company, which a competing interest would like to be advised of. This was denied, but the liquidator was directed to make up and furnish to each stockholder a comprehensive statement of the assets and liabilities of the corporation.

After the appointment of the liquidator, the hostile stockholders, through their attorney, made a demand upon the liquidator for a statement of the assets, and were assured that such a statement would be forthcoming. They then made a demand for a statement of the liabilities, specifying in detail how they wanted the statement made, and they were assured this statement would be made, and it was made. (Rec. 37.) They then repeated their demand for the right of personal inspection of the books, papers and affairs of the Evening Post Company. This was refused, and they then brought suit in the State Court in the nature of a suit for a mandatory injunction to compel the officers of the Evening Post Company to permit the Haldeman interests to personally inspect the affairs of the Post Company. That suit was brought on the 12th day of May, 1903. The petition appears on pages 25 to 30, inclusive. Answers were filed. A motion was made on May 19th for an order permitting the plaintiffs to have the inspection desired, and the case was proceeding in the State Court solely to accomplish that object. In the intervening petition, the appellants treat the hearing of that motion as the hearing of of the cause, as in fact it was. (R. 18.) The language of the petition is that "the hearing of said cause was begun" etc., "on May 23, 1903." Reference to record, page 31, will show that the motion for an inspection was the only matter before the Court on the 23d of May, 1903. The hostile interests had taken the position that the Post ought to stop publication, because it was losing money, and when they brought their suit they asked in their prayer that the Court determine whether or not the affairs of the Evening Post Company should be continued in operation, and if so, that the operation of the plant be conducted under and subject to the orders of the Court. (R. 30.)

At this point it became evident that a determined attack was to be made upon the continuation of the publication of the paper. If the publication should be suspended, certain valuable assets, like the Associated Press franchise, and others, would be imperiled and the value of the assets of the Evening Post

Company, no longer a going concern, would be depreciated from 50 to 75 per cent. When this became apparent, Stuart R. Knott, one of the creditors, brought a suit in the Circuit Court of the United States for the Western District of Kentucky, and obtained a judgment, and thereafter, execution having issued and being returned *nulla bona*, this suit in equity was brought by him for himself and all other creditors, for the purpose of taking charge of the assets of the Evening Post Company, and winding them up in such a way as would bring the greatest price. To that end steps were taken to continue the publication of the paper so that it might be sold as a going concern. The Receiver of the Federal Court was appointed on the *28th day of May*, 1903, and qualified and took charge of the property immediately. On the *4th day of June*, 1903, nearly a week afterwards, the State Court granted the application of the Haldemans for an inspection of the books and papers and affairs of the Evening Post. They then applied to the proper officers of the Evening Post Company and to the liquidator, the Columbia Finance and Trust Company, armed with this order of the State Court, and demanded this inspection, but of course at that time the only answer to be given was that the property was in the charge of the Federal Court, and that the officers and liquidator had no control over the books and were unable, therefore, to permit the inspection. *On the 27th day of June*, 1903, a month after the appointment by the Federal Court, the State Court appointed the appellant Receiver of the Evening Post Company, and in the same order referred the case to its Commissioner to advertise for creditors. The Federal Court also appointed a Commissioner with the usual instructions to advertise for creditors and audit and report their claims. None of the creditors appeared in the *State Court*, or proved or offered to prove their claims in that case, *but all of them appeared* in the Federal Court, and proved their claims before the Federal Court Commissioner, and we represent these creditors as well as the complainant. The report of the Commissioner of the Federal Court appears on pages 61 to 63 inclusive. It appears from that report that creditors holding claims amounting to $119,163.51 presented their claims before the Commissioner of the Federal Court. This report was filed on *July* 6, 1903. (R. 13.) The intervening petition was filed the same day. (R. 13.)

On these facts, the question now arises whether the Circuit Court of the United States for the Western District of Kentucky erred in refusing to surrender control over assets acquired almost a month before the State Court was asked or undertook to appoint a receiver, *or to take any steps looking to the administration of the estate of the Evening Post Company.*

We submit that the Court did not err for the following reasons:

1st. The plaintiffs in the State Court had no right to bring a suit for the settlement of the estate of the Evening Post Company. The plaintiffs in that suit are mere stockholders. It does not add to the legal argument to point out that they only held 8 per cent. of the entire stock, and that it is obvious the stock was not really worth the paper it was written on, except in so far as it may affect the question to be later discussed as to what was the real object of the suit. For the purposes of this point now under discussion we treat them simply as stockholders. The general incorporation law of Kentucky, section 561, provides that "when any corporation expires by the terms of the articles of incorporation, or by the voluntary act of its stockholders it may thereafter continue to act for the purposes of closing up its business, but for no other purpose, and it shall be the duty of the officers to settle up its affairs and business as speedily as possible; and they shall cause notice to be published for at least one week for four consecutive weeks in some newspaper printed and published in the county, if any, of the fact that it is closing up its business; and all debts and demands against the corporation shall be paid in full before the officers receive anything."

Every stockholder of a corporation organized under the general law is bound by that provision of the statute which enters into and becomes a part of the compact between the stockholders, and no stockholder has a right to set aside or ignore the inexpensive method of winding up the corporation and to substitute in lieu of it, the cumbersome and expensive suit in Chancery, unless he can show some equitable ground justifying the appeal to Chancery. In this case no attempt has been made to do that. No allegation of fraud is made, no complaint is made that the liquidator would act in an oppressive way toward the stockholders. No facts are alleged whatever that would justify a court of equity in disregarding this plain provision of the statute intended to be binding upon all stockholders. The only averment made on that subject in the petition in the State Court is found on pages 29 and 30, and is as follows:

"Plaintiffs state that it is impracticable and impossible to have a fair, just and proper accounting and settlement of the business and affairs of the said Evening Post Company except herein, and that in view of the persistent conduct of the defendants, hereinabove set out, they will not and can not be advised or informed of the assets and liabilities of the said Company until the defendants are compelled to furnish such information

herein, and are compelled to allow the plaintiffs to inspect and examine the books, accounts and affairs of the said Evening Post Company."

The persistent conduct referred to there is the refusal by the officers of the Evening Post Company to allow the Haldemans, representing hostile interests, free access to investigate all of the intimate affairs of the Evening Post Company. That allegation certainly does not amount to a sufficient reason for a court of equity undertaking the settlement of the whole estate of the Evening Post Company in order that the Haldemans might know the extent of the assets and liabilities. Furthermore, the answer of the defendants shows that before that suit was brought, statements of the assets and liabilities made out precisely according to the request of the Haldemans had been sent to and received by them. This statement was made out by an expert accountant selected by the liquidator, which is a leading reputable trust company, and there is no pretense for saying that the Haldemans were not advised of the extent of the liabilities and assets. That is the only reason given for going into a court of equity, and we submit that it is no reason whatever, and that the Haldemans have failed to show any sufficient reason for not being bound by the statute.

It is, however, contended by them that the statute was not followed in this case, in that the officers had not proceeded to wind up the estate as provided by the statute. We think there is little merit in this contention. The stockholders holding the great majority of the stock and the real owners of the paper, desiring to continue the publication of the paper, expected to become bidders at the sale of the property. This they could not do if they were also the sellers. Therefore, in order not to be embarrassed, legally or otherwise, by this situation, the whole body of stockholders acting by the majority, which included everybody except the small interest of the Haldemans, appointed the Columbia Finance and Trust Company, a highly reputable concern, the liquidator, in order that the business might in all respects be fairly and impartially transacted, so that any stockholder might protect his interests by becoming a bidder. We think this was a proper course for the stockholders to pursue, and it was no justification for the small dissenting interests held by the Haldemans to go into a court of equity and to attempt to have a cumbersome and expensive settlement. The liquidator had the right, so far as the stockholders were concerned, to proceed to advertise for creditors and to advertise the estate for sale, and to sell it and distribute the proceeds.

2d. It was not the real object of the suit to have a settlement. Upon this point we invite the Court's attention to the

petition in the State Court. (R. 25 to 30 inclusive.) The Court will perceive that there is not a single averment even tending to show that the parties had come into Court for a settlement of the whole estate, except that which we have quoted, and except the prayer itself, but the prayer does not help out the failure to make the proper averments, and the pleader does not seem to have had in his mind the necessity for stating such facts as might justify a stockholder in repudiating the method of settlement provided by statute and seeking a settlement in equity. No case is stated for a receiver, and none is prayed for.

3d. Even if the obvious purpose of the plaintiffs in the State Court had been to have a settlement, that does not necessarily imply that the Court would take possession of the property itself. The Court need not take possession merely to settle disputed questions for the guidance of the liquidator, but could leave to it the duties imposed upon it by the stockholders of advertising for creditors and advertising the property for sale, and selling and distributing the proceeds under the orders of the court. The prayer of the petition does not expressly or by implication involve the idea of the Court itself taking possession of the property.

4th. This suit, however, does involve that idea, and the creditors had the right to institute this suit and take possession of the property, and have it properly conserved by the orders of the Court, as has been done, and have it sold as a going concern and the proceeds distributed in the Federal Court itself. That was the object of the suit and the Receiver of the Court took charge of the property and had had charge of the property for a month, before the State Court was asked to or did take any action whatsoever looking either to a settlement of the estate or to the taking possession of the property.

5th. The parties to these two cases are entirely different. In the State Court case stockholders are plaintiffs and no one is made a defendant except the stockholders. The suit is, therefore, essentially one involving a quarrel between those who would be owners of the property after the payment of its debts.

In the proceeding in the Federal Court, however, the complainant is a creditor, suing on behalf of himself and all others similarly situated. The defendants are the old corporation, the liquidator and the officers of the old corporation. The bill of complaint explains exactly why all these persons are made defendants.

If the corporation had continued in existence after the expiration of its charter, then no one need have been made parties to the creditor's bill except the corporation, or except

the corporation and the liquidator, assuming that this liquidator stood in the place of a trustee. But if the proper construction of the Kentucky statutes in reference to dissolved corporations is that upon the expiration of the charter the property of the corporation vests in its then officers as trustees, these officers are proper parties.

So that the creditors might in every event be secure in their remedy against the property of this insolvent corporation, the bill of complaint makes all persons parties who would be proper parties in any view of the case. The petition in the State Court did not make any one a defendant who was not also a stockholder. It is true that the petition filed in the State Court alleged that the defendants were the only persons known to the plaintiff who claimed to be creditors. (R. 29.) But the answer of the Columbia Finance and Trust Company, filed in the State Court (R. 36-37), shows that prior to the filing of the petition in the State Court the Columbia Finance and Trust Company had furnished the plaintiffs a list of the creditors.

The allegation is specifically made, and called for a reply from the plaintiffs. This may be found on page 49 of the Record, and is in this language:

"They deny that the liquidator, Columbia Finance and Trust Company, or any other person, ever prepared or furnished any information to the plaintiffs touching the matters set forth in their petition, until after the preparation and completion thereof as filed."

From this careful statement it is apparent that prior to the time that the plaintiffs filed their petition in the State Court they had a full list of the creditors furnished to them, and that their only denial of this is that the list was not furnished until after their petition had been prepared.

The plaintiffs, then having before them a list of the creditors of the Evening Post, entirely failed to bring before the Court any one of them except such as were stockholders. And that they were challenging these debts is apparent from the petition.

Again, in the printed brief for appellant, at page 37, there is quoted from the Kentucky Code of Practice the following section:

"432. A creditor appearing before the Commissioner and presenting his claim becomes thereby a party to the action and is concluded by the final judgment of the Court allowing or rejecting his claim."

The fact is, however, that in the State Court case the plaintiffs gave no opportunity to the creditors to come before the Commissioner until long after a Receiver had been appointed in the Federal Court. In other words, it was not until a month after the Receiver was appointed in the Federal Court that the case in the State Court was referred to the Commissioner; and it must be obvious that, until the case was referred to the Commissioner, a creditor would have no opportunity to go before him with his claim.

The case in the Federal Court, however, was, from its very inception, a creditors' suit. The bill is filed on behalf of Stuart R. Knott and all other creditors. The prayer is for the marshaling of the assets and for the appointment of a receiver, and abundant reasons were given for the appointment of a receiver to take into custody the assets of this insolvent corporation. So that in the Federal Court case the complainant at once moved the Court to appoint a receiver, as he had prayed in his bill. And the creditors promptly came forward and proved their claims in the Federal Court, and had so proved them prior to the time that any effort was made by the Louisville Trust Company, Receiver of the State Court, to intervene in the Federal Court.

If it is true that a suit between stockholders will prevent the creditors of an insolvent corporation from filing a creditors' bill to subject the property of the corporation to their demands, then it must be likewise true that if one partner files a bill against his co-partners, asking a settlement of the partnership estate, this will prevent the seizure of any of the partnership property by process of law on the part of any of the creditors of the partnership.

The position, therefore, that the appellant must sustain in this case is of the most radical character and involves the doctrine that a stockholder of a dissolved corporation, or a partner of a dissolved partnership, can bring a suit against his co-stockholders or his co-partners, in a court of equity, and ask the Court to administer the insolvent estate. He need not pray for a receiver, nor ask that one be appointed. To the contrary, he may leave the assets in the possession of the corporation or of a liquidator, or of the co-partners, and this proceeding will, in and of itself, deprive all other courts of jurisdiction over these assets; and these assets—all of them—being in the constructive possession of the Court, can not be attached, nor levied upon at the suit of a creditor, nor taken possession of by a receiver at the suit of a creditor. The simple filing of such a bill is sufficient to impound the assets, constructively or portentially, and put an end to the jurisdiction of all other courts, so far as such assets are concerned. And this, too, in a case where no cred-

itors except co-stockholders or co-partners are made parties, and no reference made to a commissioner to bring in any such creditors.

We hardly think it necessary to undertake a review of the authorities upon this question in view of the able opinion of the lower Court, which does it so well. We, however, call the Court's attention to the case of Shields vs. Coleman, 157 U. S. 177, as settling one proposition which in our opinion is conclusive of this case. In that case the Federal Court had appointed a receiver, and then, having accepted a bond from the defendant, discharged the receiver and restored the property to the corporation. Thereafter the State Court appointed a receiver and took charge of the property, and then after that, the Federal Circuit Court undertook to again appoint a Receiver and wrest the property from the State Court. This Court held that could not be done. In discussing that question, the Court said:

"For the purposes of this case it is unnecessary to decide whether, as between courts of concurrent jurisdiction, when proceedings are commenced in the one court with the view of the appointment of a receiver, they may be continued to the completion of actual possession, and whether, while those proceedings are pending in a due and orderly way, the other court can, in a suit subsequently commenced, by reason of its speedier modes of procedure, seize the property, and thus prevent the court in which the proceedings were first commenced from asserting its right to the possession. Gaylor v. Fort Wayne, etc. Railroad, 6 Bissell, 286-291, cited in Moran v. Sturgis, 154 U. S. 256-270; High on Receivers, 3d Ed., Sec. 50. Of course, the question can fairly arise only in a case in which process has been served, and in which the express object of the bill, or at least one express object, is the appointment of a receiver, and where possession by such officer is necessary for the full accomplishment of the other purposes named therein. The mere fact that, in the progress of an attachment or other like action, an exigency may arise, which calls for the appointment of a receiver, does not make the jurisdiction of the court, in that respect, relate back to the commencement of the action."

We take the liberty of repeating the test laid down by the Court, which, we think, is conclusive of this case.

"*Of course, the question can fairly arise only in a case in which process has been served, and in which the express object of the bill, or at least one express object, is the appointment of a receiver, and where possession by such officer is necessary for the full accomplishment of the other purposes named therein.*"

Now in the State Court case it is neither the express nor the implied object, nor one of the objects, of the bill to have a receiver, nor was the possession by the Court of the property necessary for the accomplishment of the purposes named in the bill.

While that is unquestionably true as to the State Court, as we have heretofore shown, it is not true as to the Federal Court, and the latter Court, having taken possession of the property at the instance of the creditors for the purposes of settlement, we submit, correctly refused to surrender the property to the State Court.

In Compton v. Jesup, 68 Fed. Rep., 263, it appeared that one Compton had filed a suit in the State Court to foreclose his lien upon certain railroad property. Subsequently, in a bill filed in the Federal Court, receivers were appointed for this same property. The question came up as to the effect of the assumption of jurisdiction by the Federal Court, of this property, under these circumstances. Judge Taft, in delivering the opinion of the Court, said:

"It is further objected that the Court below had no power to take possession of the railroad property by its receivers in 1884, pending the suit of Compton in the Common Pleas Court, to subject the property to the payment of his liens. The argument is that Compton's suit was in the nature of a proceeding *in rem*, which impounded the property, and excluded any other court from assuming actual possession of it. Heidritter v. Oil Cloth Company, 112 U. S. 294; 5 Sup. Ct. 135; is cited in support of this proposition. That was an ejectment suit. The plaintiff claimed under a sheriff's deed executed to a purchaser at a judicial sale by order of a State Court, in a proceeding to enforce a mechanic's lien against the premises in controversy. The defendant claimed under a marshal's deed executed to the purchaser at a judicial sale by order of a Federal Court, in a proceeding under the internal revenue laws, to forfeit the premises because used for illegal distilling. When claims for the mechanic's liens were filed, and suits were brought to enforce the same, in accordance with the New Jersey statute, the premises were in the actual custody of the United States marshal, who had taken possession under process of attachment issued on an information to enforce a forfeiture, which resulted subsequently in a sale, and the deed under which defendant claimed. The sale under the proceedings in the State Court took place a few days after that by the United States marshal. It was held that proceedings begun in the State Court in the nature of proceedings *in rem* to subject the premises to sale were ineffectual to confer any legal title on a purchaser, if at the time they were begun the property was in the actual custody of the Federal

Court for the purpose of a judicial sale by the latter Court. It was not decided, however, that the proceedings in the State Court might not be valid to establish the lien. The holding was expressly limited to the point that a deed under the State proceeding vested no legal title as against the title conferred by the Court first having actual custody of the property. It was the actual custody of the premises in the Federal Court which excluded the right of another court to entertain jurisdiction of a proceeding to subject the property thus removed from its control and disposition to a sale for the purpose of vesting a title superior to that which might be conferred by the Federal Court. Mere constructive possession would not have been enough to exclude possession by another court. In a conflict of jurisdictions it is manifest that there can be no constructive possession by one court, where it can not take actual possession, but it by no means follows that the constructive possession of one court will exclude the actual taking possession by another. For this reason, even if the proceeding in the Lucas Common Pleas to establish Compton's lien was a proceeding *in rem*, it did not involve the actual seizure of the property pending the suit, and did not, therefore, prevent the Federal Court from taking actual possession of the property, through its receivers, in a proceeding to foreclose mortgages and other liens than Compton's. This objection to the jurisdiction of the Court below over the Knox and Jesup bill cannot, therefore, be sustained."

The intervening petition of the appellant contains certain allegations in reference to the reason why the complainant, Stuart R. Knott, brought his suit, and commented upon the fact that judgment was confessed and appearance entered to the suit at law and the bill in equity. And these allegations are brought forward with considerable emphasis in the brief of the appellant, on file. (P. 14-15.)

When the intervening petition was presented, the complainant, Stuart R. Knott, filed exceptions to these allegations on the ground that they were irrelevant and impertinent, and asked that they be stricken out. (R. 14.) As the Court denied the relief asked for in the prayer of the intervening petition, it did not pass upon the motions to strike out.

As is said in Dickerman vs. Northern Trust Company, 176 U. S. 188, "it should be borne in mind, in connection with the several defenses set up by the intervenors, that they do not appear here in the capacity of creditors, but as stockholders; that their rights are the rights of the corporation and must be asserted and enforced through the corporation, and upon the theory that the latter has, or threatens by collusion or otherwise to neglect the proper defense of the foreclosure suit."

We refer to this case as stating very fully the doctrine that the imputation of a bad motive will not be a defense to the assertion of a legal right.

It is not alleged in the intervening petition of the Louisville Trust Company that the Evening Post Company did not owe Stuart R. Knott the amount he claimed. If the debt was a just one, why should not then the Evening Post Company enter its appearance and consent to a hearing of the cause?

Again, the intervening petition does not deny the allegation of Stuart R. Knott's bill of complaint that, if such relief as is therein claimed be not afforded, then the property of the said Evening Post Company will be dissipated or damaged to such an extent that creditors will not obtain anything like what is justly due to them; that there is no remedy at law for the complainant and other persons similarly situated that is in any degree adequate. (R. 5.)

How can it be said that the only purpose of the complainant's bill is to defeat the jurisdiction of the State Court, when the effect of the prosecution of the complainant's bill will be to have a decree of sale of all the assets of the Evening Post and a distribution of the proceeds of such sale among its creditors?

Suppose it to be true that Mr. Richard W. Knott, seeing that if the quarrel went on in the State Court, among the stockholders, the creditors would lose what was justly due to them, did ask his brother, Mr. Stuart R. Knott, to do what he could to prevent this catastrophe? The fact is that the complainant, Stuart R. Knott, brought a suit in the Federal Court, being represented by counsel who had never been employed by nor appeared for any one in the State Court. It is a further fact that judgment was obtained upon the debt of the complainant, execution issued and a return of *nulla bona* made. The intervening petition does not allege that the *nulla bona* return was a false return. It does not allege that there were assets upon which the marshal could have levied to make the debt of Stuart R. Knott. The complainant, Stuart R. Knott, thereupon filed his bill for himself and all other creditors and had a receiver appointed. Suppose that Mr. Richard W. Knott and the other defendants believed that the debt of the complainant was a just one, and that there were many other just debts, and that in order to pay these debts it was necessary to have a receiver appointed, an arrangement made for the continuation of the paper and the proper proceedings taken for the sale of the paper as a going concern—the intervening petition does not deny the truth of any of these things.

It can not be the law that the jurisdiction of the Federal Court depends upon the purpose which a litigant has in view when invoking it. It is sufficient that the litigant has a claim

which is a just claim, and which, under the law, he has a right to assert in that tribunal. And it is a sufficient reason for such litigant's filing a bill in equity to appoint a receiver, that he has such grounds as are sufficient for the appointment of a receiver. These grounds the intervening petition does not dispute.

We respectfully submit that these allegations are mere make-weights; that they are irrelevant and impertinent, and even if every one of them were true, they would present no reason for discharging the Federal Court Receiver and turning over the property to the State Court Receiver. For what, in the meantime, is to become of the rights of the other creditors who have made themselves parties to the Federal Court proceeding, by proving their claims before the Commissioner?

It is not alleged that anybody induced them to prove their claims, or to come forward, as they so promptly did, to take advantage of the bill filed by the judgment creditor.

We respectfully submit, therefore, that there was nothing in this intervening petition which would have justified the Federal Court in giving up the jurisdiction lawfully invoked by the creditors of the Evening Post Company, and in the orderly exercise of which alone the debts of that Company will receive the first consideration and the disputes of the stockholders be relegated to a time when it shall be determined that there is anything left to dispute over.

ALEXANDER P. HUMPHREY,
JAMES P. HELM,
Counsel for Appellees.

Supreme Court of the United States.

No. 389.—October Term, 1903.

The Louisville Trust Company, Receiver of the Estate of The Evening Post Company, Appellant,
vs.
Stuart R. Knott et al.

Appeal from the Circuit Court of the United States for the Western District of Kentucky.

[November 30th 1903.]

Mr. Justice Harlan delivered the opinion of the Court.

This case arises out of the conflicting claims by the Circuit Court of the United States for the Western District of Kentucky, and the Circuit Court of Jefferson County, Kentucky, Chancery Branch, as to the right to administer the property and affairs of the Evening Post Company, a corporation of Kentucky.

The Federal court having possession, by its Receiver, of the property of that company, declined to surrender possession to the Louisville Trust Company, the Receiver appointed by the State court. From the final order dismissing the intervening petition of the latter company, the present appeal was prosecuted. That order stated: "This appeal is granted solely upon the question of jurisdiction over the subject-matter of the trust estate of the Evening Post Company in controversy, and the question of whether this court, or the said Jefferson Circuit Court, Chancery Branch, First Division, has prior jurisdiction in [is] the single question upon which this cause is decided as to the said Louisville Trust Company; this court holding that its jurisdiction over the said trust estate of the Evening Post Company is prior and exclusive of the said Jefferson Circuit Court, Chancery Branch, First Division, all of which is hereby certified on the appeal of the said Louisville Trust Company as Receiver, &c., to the Supreme Court of the United States for review as required by law."

It will be more satisfactory and conduce to a clear understanding of the precise grounds upon which our decision must rest if the principal facts in the history of this controversy be stated.

On the 30th day of April 1903, at a meeting of the stockholders of the Post Company, a resolution was adopted—all the stockholders except the owners of forty-eight shares concurring—by which the Columbia Finance and Trust Company was appointed liquidator of that corporation, with

authority to conduct its business and affairs for the benefit of stockholders until its property could be sold and possession delivered to the purchaser in accordance with the statute of Kentucky. The liquidator was directed from the proceeds of sale to pay the debts of the corporation, and to distribute any balance remaining among stockholders according to their legal rights. It took immediate possession of all the property, books and papers of the Post Company.

On the 10th day of May 1903 another corporation was organized under the laws of Kentucky. It is referred to in the record as the New Evening Post Company. To that company the liquidator on May 18th 1903 leased the property and assets of the old Company, until a sale should take place.

Prior the making of that instrument, to wit, on May 12th 1903, the executors and executrix of the estate of W. N. Haldeman commenced a suit in the Jefferson (Kentucky) Circuit Court, Chancery Branch, First Division, against the old Post Company, the Columbia Finance and Trust Company, Richard W. Knott, J. M. Atherton, John R. Knott, Eugene Q. Knott and Laura G. Boyle—the plaintiffs and the individual defendants being respectively owners of stock in the old company. The object of that suit, as disclosed by the petition, was to obtain a settlement of the accounts of the company and of its liquidator; and to that end the plaintiffs asked a reference of the cause to the commissioner of the court to audit and settle the accounts of the Columbia Finance and Trust Company, and after such auditing and settlement, that the assets of the company be sold, and the proceeds distributed according to law. The plaintiffs further prayed that pending the action and until the final liquidation of the affairs of the old company and the sale of its assets, the court determine whether its affairs should be continued in operation, and if so that the management of the plant be under the direction of the court; further, that a preliminary order be entered, commanding and directing the defendants and each of them to allow the plaintiffs reasonable access to and an examination of the books, papers, documents and affairs of the old company, including all documentary information in connection therewith in the possession of defendants or of either of them.

On the 19th of May 1903, upon due notice, the plaintiffs moved for an order directing the defendants to allow the plaintiffs, their counsel and accountant, reasonable access to and inspection of the books, records and documents of the old company, relating to its assets, liabilities and business affairs. To that motion the defendants objected, and the motion was assigned for hearing on May 23d 1903. On the day last named the parties appeared, the plaintiffs filed affidavits in support of their motion, and the defendants interposed a demurrer to the petition, as well as filed their several answers. The motion and demurrer were heard in part, and the further

hearing of them was postponed until May 25th 1903. On the latter day, the hearing not being concluded, the cause was postponed until the 30th of May, on which day it was submitted on the pending motion of plaintiffs, on defendants' demurrer to the petition, and on a motion of the Columbia Finance and Trust Company, entered on that day, for leave to file an amended and supplemental answer. By an order entered June 4th 1903 the plaintiffs' motion, made on the 19th day of May 1903, was sustained, and the defendants, and each of them, were commanded and directed, until the further orders of the court, to allow and afford the plaintiffs, their attorneys or accountant, during business hours, reasonable access to and an inspection of the books, records and documents of the Post Company, touching its condition and business affairs, and especially touching its assets and liabilities, and the considerations paid or received therefor. The demurrer of the defendants was also overruled, and the objection to the filing of the amended and supplemental answer of the Columbia Finance and Trust Company, trustee, tendered May 30th 1903, was sustained.

While the above motion in the State court was pending, Stuart R. Knott, a citizen of Missouri, and not a party to the suit in the State court, obtained, May 26th 1903, in the Circuit Court of the United States for the Western District of Kentucky, a judgment against the old company for 86,000 with interest from April 30th 1903. Upon that judgment execution immediately issued and was returned the next day, May 27th 1903, "no property found." And on the latter day the present suit was commenced by him in the United States Circuit Court, against the Evening Post Company, Columbia Finance and Trust Company, R. W. Knott, B. G. Boyle and E. Q. Knott, each defendant being a citizen of Kentucky. The prayer of the bill was that the court at once appoint a Receiver of all the rights, properties, franchises, books of account, records, documents, choses in action and all other things belonging to the Post Company, forthwith to report what such property is, and what arrangement can be made for the continued publication of said paper until a decree could be entered directing a sale herein; that all proper equitable relief may be had looking to the administration of the estate of the company and the payment of its just debts; and to that end the sale of its property and the bringing of any money produced by such sale into the registry of the court for distribution among creditors.

On the 28th day of May 1903, all the defendants in the suit in the United States Circuit Court assenting thereto, a Receiver of the property and assets of the Post Company was appointed by that court, and the defendants were directed forthwith to deliver to him all such property and assets of every kind and description. That Receiver took immediate posses-

sion and, under the authority of the court, entered into a contract with the new company for the publication of the paper until the assets of the old company were sold.

The plaintiff in the suit in the State court entered, June 13th 1903, a formal motion to appoint a Receiver to take charge of and manage the property and affairs of the Post Company; and on June 18th the defendants in that suit appeared and objected to the motion upon the ground that the assets of the company were already in the possession and under the control of a Receiver appointed by the United States Circuit Court in the suit instituted by Stuart R. Knott. This objection was overruled, and the State court, by order entered June 27th 1903, appointed the Louisville Trust Company receiver, with authority to claim and take possession of the property and assets of the Post Company. By the same order the commissioner of the court was directed to audit, state and settle the accounts of the Columbia Finance and Trust Company as liquidator and trustee of the old Post Company.

Subsequently, June 30th 1903, the State court, by order then entered, directed its Receiver to intervene in the suit instituted in the Federal court and claim the estate in question for administration and settlement in the State court. The latter court was of the opinion that its jurisdiction to administer the said trust estate first attached, and in order that the relief sought at its hands might be granted it was necessary that it have possession and control of the property of the Post Company. Its Receiver was therefore ordered to intervene in the suit pending in the Federal court, claim the trust estate for administration and settlement in the State court, and test the question as to the prior jurisdiction of the State court over the subject matter.

Pursuant to that order the Louisville Trust Company intervened in the suit in the Federal court and moved that its Receiver be directed to turn over the property to the Receiver of the State court. This motion was denied, Judge Evans, of the Federal court, accompanying the denial of the motion with an elaborate opinion, (*Knott* v. *Evening Post Co.*, 124 *Fed. Rep.* 342,) which concluded as follows: "First, that the proceedings in the suit in the State court, when given their just effect, had not, in any way, when this court's Receiver was appointed, brought into the custody of that court any property of the Evening Post Company, nor could they be regarded as having, in fact, done so even if their scope were measured by the prayer of the plaintiff's petition rather than its averments; second, that it was, therefore, open to this court to appoint a Receiver, and thereby judicially seize the property of the company at the instance of a judgment creditor; and, third, that having thus first acquired jurisdiction over the property thus seized, the established principles of law and the plain rights of the judgment creditor demand that this court

shall maintain its jurisdiction over it under these circumstances as certainly as it would have abandoned it if the first seizure had been by the State court. It results that the motion of the intervening petitioner must be overruled and denied and intervening petition dismissed."

We are of opinion that the judgment of the Circuit Court dismissing the intervening petition of the Louisville Trust Company is not subject to review here upon direct appeal or writ of error to that court.

By the Judiciary Act of March 3d 1891, c. 517, 26 *Stat.* 826, an appeal or a writ of error, as the one or the other mode may be proper, can be taken directly from a Circuit Court to this court in certain specified cases, among which is "any case in which the jurisdiction of the court is in issue;" and "in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision." § 5. In all cases, other than those specified in section five of that act, the Circuit Court of Appeals is given appellate jurisdiction. § 6.

The question presented by the certificate of the Circuit Court is not one of *jurisdiction*, within the meaning of the fifth section of the act of 1891, and the jurisdiction of that court was not "in issue." There was diversity in the citizenship of the parties to this suit, instituted by Stuart R. Knott as a citizen of Missouri, and no question was raised, or could have been raised, as to the authority of the Circuit Court, as a Federal court, to take cognizance of it. The issue made by the intervening petition of the Louisville Trust Company did not involve the jurisdiction of that court, as a Federal tribunal, to appoint a receiver of the assets and property of the Evening Post Company. What the Circuit Court did in that respect was questioned by the Trust Company, on behalf of the State court, solely upon the ground that the taking by the Federal court of possession of the property and assets of the Post Company—after the State court by the institution of the Haldeman suit had acquired authority to appoint a receiver of such property and assets for administration—was in violation of the rule recognized in courts of equity, whether of Federal or State origin, that "where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court;" that as the object of the suit in the State court could not be accomplished without possession of the property and assets of the Post Company, the seizure of such property and assets under the order of the Federal court, whereby the State court was prevented from giving any effectual relief to the parties before it, was inconsistent with the relations which, upon principles of comity and right, always exist between courts having concurrent jurisdiction over the same subject matter. *Peck* v. *Jenness*, 7 *How.* 624; *Taylor* v. *Camyl*, 20 *How.* 596.

In all this there was nothing involving the jurisdiction of the Circuit Court as a Federal tribunal, whose jurisdiction is regulated by acts of Congress. The question of jurisdiction which the statute permits to be certified to this court directly must be one involving the jurisdiction of the Circuit Court as a Federal court, and not simply its general authority as a judicial tribunal to proceed in harmony with established rules of practice governing courts of concurrent jurisdiction as between each other.

We think this question was substantially so determined in *Smith* v. *McKay*, 161 *U. S.* 355, 357. That was a suit in equity for an injunction to restrain the defendants from using certain patented machines until they had fully paid the fees they had agreed to pay to the patentee. The defendants moved to dismiss the bill upon the ground that there was a plain, adequate, and complete remedy at law—thus raising only a queston of equity jurisdiction. The motion to dismiss was denied. After final decree for the plaintiff, the case was brought directly to this court by appeal, and it was assigned for error that the Circuit Court erred in not dismissing the suit for want of jurisdiction. The position of the appellee in that case was that only questions of Federal jurisdiction could be brought directly here; and that if the Circuit Court had jurisdiction of the parties and of the matters in dispute, the fact that the remedy of the plaintiff was at law, rather than in equity, raised no question of jurisdiction within the meaning of the fifth section of the Judiciary Act of March 3d 1901 under which the appeal was taken.

The court observed that the question had never been directly decided by it, but that it arose in the *World's Columbian Exposition case*, (18 *U. S.* App. 42,) in which the Circuit Court sitting in equity granted an injunction to prevent the opening of the Exposition Grounds to the public on Sunday. That case was taken by appeal to the Circuit Court of Appeals for the Seventh Circuit, and a motion was there made to dismiss the appeal. Chief Justice Fuller, speaking for that court, said: "The appellees have submitted a motion to dismiss the appeal upon the grounds that the jurisdiction of the Circuit Court was in issue; that the case involved the construction or application of the Constitution of the United States; that the constitutionality of laws of the United States was drawn in question therein; that therefore the appeal from a final decree would lie to the Supreme Court of the United States, and not to this court; and hence that this appeal, which is from an interlocutory order, cannot be maintained under the seventh section of the Judiciary Act of March 3d 1891. We do not understand that the power of the Circuit Court to hear and determine the cause was denied, but that the appellants contended that the United had not, by their bill, made a case properly cognizable in a court of equity. The objection was the want of equity, and not the want of power.

The jurisdiction of the Circuit Court was, therefore, not in issue within the intent and meaning of the act."

Referring to these observations of the Chief Justice, this court in *Smith* v. *McKay* said: "We regard this as a sound exposition of the law, and applied to the case now in hand, it demands a dismissal of the appeal, on the ground that the objection was not to the want of power in the Circuit Court to entertain the suit, but to the want of equity in the complainant's bill. The applicants' contention in this respect would require us to entertain an appeal from the Circuit Court in every case in equity, in which the defendant should choose to file a demurrer to the bill on the ground that there was a remedy at law. When the requisite citizenship of the parties appears, and the subject matter is such that the Circuit Court is competent to deal with it, the jurisdiction of that court attaches, and whether the court should sustain the complainant's prayer for equitable relief, or should dismiss the bill with leave to being an action at law, either would be a valid exercise of jurisdiction. If any error were committed in the exercise of such jurisdiction, it could only be remedied by an appeal to the Circuit Court of Appeals." (161 *U. S.* 355, 358.)

In principle, the judgment in *Smith* v. *McKay* embraces the present case. The issue presented by the intervening petition did not raise any question under the Constitution or statutes of the United States, and depended only upon principles of general law applicable to all courts having concurrent jurisdiction over the same subject matter. We repeat that the jurisdiction of the Circuit Court was not and is not questioned for want of power in that court, as a Federal tribunal, to take possession of the assets and property of the Post Company; only its authority, upon principles of equity and comity, to do that of which complaint was made by the Louisville Trust Company. We do not think that Congress intended that any such question should be the basis of a direct appeal to this court from a Circuit Court.

The question again arose in *Blythe* v. *Hinckley*, 173 *U. S.* 501, 506, where this court said: "Appeals or writs of error may be taken directly from the Circuit Court to this court in cases in which the jurisdiction of those courts is in issue, that is, their jurisdiction as Federal courts, the question alone of jurisdiction being certified to this court. The Circuit Court held that the remedy was at law and not in equity. That conclusion was not a decision that the Circuit Court had no jurisdiction as a court of the United States. *Smith* v. *McKay*, 161 *U. S.* 355; *Blythe Company* v. *Blythe*, 172 *U. S.* 644, The Circuit Court dismissed the bills on another ground, namely, that the judgments of the State courts could not be reviewed by that court on the reasons put forward. This, also, was not in itself a decision of want of jurisdiction because the Circuit Court was a Federal court, but a decision that the Circuit Court was unable to grant relief

because of the judgments rendered by those other courts. If we were to take jurisdiction on this certificate, we could only determine whether the Circuit Court had jurisdiction as a court of the United States, and as the decree rested on no denial of its jurisdiction as such, but was rendered in the exercise of that jurisdiction, it is obvious that this appeal cannot be maintained in that aspect."

It is proper to observe that this court in *Shields* v. *Coleman*, 157 *U. S.* 168, 177, assumed jurisdiction upon direct appeal from a Circuit Court in a case involving the question whether that court had authority to appoint a receiver of property which was at the time in the possession of a receiver appointed by a State court. As the Federal court had, in that case, taken property out of the physical possession of a receiver of the State court, this court expressed its views upon the question whether the possession of the State court should have been disturbed by the Federal court, and it rendered judgment accordingly. But the precise question here presented as to the jurisdiction of this court under the act of 1891, on direct appeal from the Circuit Court, was not there raised or considered. In *United States* v. *More*, 3 *Cr.* 159, 171, (1805,) it was held that this court was without jurisdiction, under the law as it then was, to review the final judgment of the Circuit Court of the District of Columbia in a criminal case. It was suggested at the bar, in that case, that this court had, in a previous case, exercised appellate jurisdiction in a criminal case. Chief Justice Marshall met that suggestion by saying: "No question was made in that case as to the jurisdiction. It passed *sub silentio*, and the court does not consider itself as bound by that case." To the same effect, substantially, are *United States* v. *Sanges*, 144 *U. S.* 310, 319, and *Cross* v. *Burke*, 146 *U. S.* 83.

In the circumstances of the present case, and to avoid misapprehension in the future, we deem it our duty distinctly to declare the true meaning of the word jurisdiction as used in the fifth section of the Judiciary Act of 1891.

For the reasons stated, the appeal from the Circuit Court must be dismissed for want of jurisdiction in this court.

It is so ordered.

True copy.

Test:

Clerk Supreme Court, U. S.